The true portraiture of Iudg Littleton the famous English Latwyer

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AN ABRIDGMENT OF THE Lord *Coke*'s Commentaries UPON LITTLETON:

BEING

A Brief Explanation of the Grounds of the Common Law.

COMPOSED

By that Famous and Learned Lawyer, Sir *Humphrey Davenport*, Knight, ſometime Lord Chief Baron of the Honourable Court of Exchequer at *Weſtminſter*.

WITH

A TABLE of the moſt Remarkable Things therein contained.

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TO THE

READER.

READER,

WHether thou reſpecteſt Law *in general, being the* Tutelary Genius *of all* Society, *the* Palladium *of* Security *and* Plenty, *and they, the* Fountains *of all* Sublunary *Happineſs: Or more particularly, the* Common Law, *thy Native and beſt* Right, *(the grounds of which thou haſt in hand) not inferior in* Dignity *(being the* Progeny *of the moſt* Cryſtalline *and ſinewy* Reaſon) *to any* (merely Humane) *under Heaven: Or* LITTLETON, *whoſe piercing and comprehending* Judgment *entituled him to the deſerved Honor of being* Textuary. *Or the Lord* COKE, *whoſe ſpacious and volumi-*

nous Mind hath juſtly made him Famous by his Commentary : Or Sir HUMPHREY DAVENPORT *the* Epitomizer, *a Gentleman of great note, and Eminent employment in* The *Profeſſion : Or laſtly, thy own* Benefit *(perchance) more* impulſive *than all the reſt, thou canſt not without unexcuſable Folly, or a very great ſtock of* Ingratitude, *either think this pains Uſeleſs, or ſcornfully reject it : If thou doſt, at thy peril be it. I will not wiſh thee the Want of* Law *or* Wit, *untill I know my ſelf which is the worſt condition.* Vale.

R. M. *Barr.*

Liber

Iuris prudentium eloquentissimus
et Eloquentium Iuris prudentissimus

Liber Primus.

CHAP. I.

De Feodo Simplici.

Sect. 1.

Feodum ſimplex idem eſt quod hæreditas legitima, vel pura. Tenant in fee ſimp. 1. He hath the eſtate in the land 2. He holdeth the land of ſome ſuperior Lord, 3. He is to perform the ſervices due. And 4. He is thereunto bounden. 5. By doom and judgment. *Prædium domini regis eſt directum dominium, cujus nullus Author eſt niſi Deus. Subjectus habet utile dominium.* Bract. l. 1. c. 8.

Fee ex feif (i) prædium beneficiarum. Fee divided into 3 parts, *viz.* ſimple or abſolute, conditional, qualified, or baſe. *Bract.* 263. & 207. *Pl. Com. Walſing. c. Dy.* 252, 253. *Fee* ſignifies that the land belongs to us and our heirs, and in this ſenſe the King is ſaid to be ſeiſed in Fee. It is alſo taken, as it is holden of another by ſervice, and that onely belongeth to the ſubject. *Brit.* 205, 207. *Item dicitur feodum alio modo ejus qui alium feoffat, & quod quis tenet ab alio, ut ſit qui dicat, talis tenet de me tot feoda per ſervitium militare,* and *Fleta* ſaith, *poterit unus tenere in feodo quoad ſervitia, ſicut dominus Capitalis, & non in dominico; alius in feodo, & dominico, & non in ſervitio, ſicut libere tenens alicujus;* and therefore if a ſtranger claim a Seigniory, and diſtrain, and a vow for the ſervice,

the Tenant may plead, that the Tenancy is *extra feodum, &c.* of him (that is) out of the ſurrendry, or not holden of him that claimeth it, but he cannot plead *hors de ſon fee*, unleſs he take the Tenancy, that is, the State of the Land upon him. 2 *Aſſ. p.* 4. 12 *Aſſ.* 38. 12 *E.* 3. *tit. hors de ſon fee* 28. (i. b.) *ignoratis terminis, ignoratur & ars. Si un annuitie ſoit grant al home & à ſes heirs ceo eſt fee ſimple perſonal.*

Simplex idem eſt quod purum, & purum dicitur, quod eſt merum & ſolum ſine additione. Simplex donatio & pura eſt ubi nulla addita eſt conditio ſive modus ſimplex enim datur quod nullo additamento datur, every fee is not legitimate; for a diſſeiſor, abator, intruder, uſurper, *&c.* hath a fee, but not a lawfull fee, *fo.* 2. *a.*

Si un alien purchaſe três, &c. Le roy ſur office trove eux aura, home attaint de felony, nad capacity de purchaſer, ſinon pur le benefit del roy, Dyer, 283. An Alien Merchant whoſe King is in league with ours, may take a leaſe for years of a houſe for habitation, as incident to commercery, and as neceſſary to his trade and traffick, but not for the benefit of his Executors or Adminiſtrators; for if he dye poſſeſſed of the leaſe, or relinquiſh the Realm, the King ſhall have it, 5 *Mar. Br. tit. denizen.* 22.

If a man commit felony, and after purchaſe lands, and is attaint, the Lord of the fee ſhall have the Eſcheat, 49 *Aſſ. p.* 2. 49 *E.* 3. 11.

If any ſole corporation, or aggregate of many, *religioſus vel alius*, eccleſiaſtical or temporal; purchaſe Lands in fee, without licence, they cannot retain, for if the meſn Lords make default, and do not enter, *&c.* the King ſhall have the Lands, *&c.* 7 *E.* 1. *De. Relig. per.* alienation in *Mortmain les Seignors perdont lour eſcheats*, and in effect the ſervice *de chivaler per defence del royalm*, ward, marriage, relief, *&c. Et pur ceo fut dit mortmain quod rend. nul. ſervice.*

Stat. delig. 7. *E.* 1. *per quod quæ ſervitia ex hujuſmodi feodis debentur, & quæ ad defenſionem, regni ab initio proviſa fuerunt, indebite ſubtrahuntur, & capitales domini eſchaet. ſuas amittunt. M. Ch. c.* 36. *Prælatus eccleſiæ ſuæ conditionem meliorare poteſt,*

poteſt, deteriorare nequit. Eſt enim eccle. ejuſdem conditionis, quæ fungitur vice minoris. Sed nullum ſimile quatuor pedibus currit. (2. b.) *Brac. l. 2. f. 12. & 32. Si feme covert* purchaſe Lands, *&c. Le baron poit diſagreer & deveſt tout leſtate*; but albeit her husband agreed thereunto, after his death ſhe may wave the ſame, and ſo may her heirs alſo, if ſhe her ſelf agreed not, *&c.* after the deceaſe of her husband. The Queen is an exempt perſon (by the Common-law) from the King, and may purchaſe and grant, *&c. Uxor* is a good name of purchaſe, without a Chriſten-name, and ſo it is, if a Chriſten-name be added and miſtaken. *Utile per inutile non vitiatur*, 1 *H.* 5. 8. Purchaſes are good in many caſes by a known name, or by a certain deſcription of the perſon without either ſurname, or name of Baptiſm, as *uxori* J. S. or *primogenito filio.* J. S. or *rect. hæred.* J. S. But regularly in writs the demandant or plaintiff is to be named by his Chriſten-name and ſurname unleſs it be the caſe of ſome corporations, or bodies politique (3.a.) 8 *E.* 3. 437. *qui ex damnato coitu naſcuntur, inter liberos non computentur. Baſtardus eſt quaſi nullius filius.* A man makes Leaſe for life to *B.* the remainder to the eldeſt iſſue male to be begotten of the body of *Jane S.* whether the ſame iſſue be legitimate or illegitimate *B.* hath iſſue a baſtard on the body of *J. S.* this Son or iſſue ſhall not take the remainder, becauſe in Law he is not his iſſue. *M.* 38. *&* 39. *el. in bre. de err.*

A Baſtard may purchaſe by his reputed name to him and his heirs, although he can have no heir but of his body, 39 *E.* 3. 11. 24. 17 *E.* 3. 42. 35 *Aſ.* 13. 41. *E.* 3. 19. An office which concerns the benefit or ſafety of the Commonwealth, *&c.* granted to a man which is unexpert, and hath no skill or ſcience to exerciſe or execute the ſame, the grant is merely void, and the party diſabled by Law to take the ſame, *pro commodo regis & populi.* Dyer. 150.

An infant or minor is not capable of an office of Stewardſhip of the Court of a Manor, either in poſſeſſion or reverſion. No man, though never ſo skilfull, *&c.* is capable of a judicial office in reverſion, but muſt expect untill it fall in

poſſeſſion, *l.* 11. 2. *Sect.* 378. The King is capable of an office, not to uſe, but to grant. A purchaſe is, *&c.* when one cometh to lands by conveiance or title; and not by tort, as by diſſeiſin, *&c.* Note that purchaſers of lands, tenants, leaſes, and hereditaments, for good and valuable conſideration, ſhall avoid all former fraudulent and covin conveyance, eſtates, grants, charges, and limit of uſes, of or out of the ſame. *Stat.* 27. *El. cap.* 4. (3 b.) 13 *El. c.* 5. *l.* 3. 80. *Twine's* caſe. States of inheritances of lands, are either certain or unmoveable, whereof *Littl.* here ſpeaketh; or uncertain and moveable, as if partition be made between two Co-partners of one and the ſelf ſame land, that the one ſhall have it the firſt year, and the other the ſecond year *alternis vicibus, &c.* (4. 2) *l.* 1. 87. *F. N. B.* 62. Between *paſtura & paſcuum* the legal difference is this, that *paſtura* in one ſignification containeth the ground it ſelf called paſture, and by that name is to be demanded. *Paſcuum* is whereſoever cattel are fed, of what nature ſoever the ground is, and cannot be demanded in a *præcipe* by that name (4. b.) many things may paſs by a name, that by the ſame name cannot be demanded by a *præcipe*, for that doth require a more perſcript form, but whatſoever may be demanded by a *præcipe*, may paſs by the ſame name by way of grant, *Ibid.* (5. b.) If the Feoffor be bound to warranty, and ſo to render in value, then is the defence of the title at his peril, and therefore the Feoffee in that caſe ſhall have no deeds that comprehend warranty, whereof the Feoffor may take advantage. Alſo he ſhall have ſuch charters as may ſerve him to deraign the *warranty paramount*; but other evidences which concern the poſſeſſion, and not the title of the land, the Feoffee ſhall have them. (6. a) *l.* 11. 1. & 2. There have been eight formal or orderly parts of a deed of Feoffment, *viz.* 1. The premiſſes. 2. *Habendum.* 3. *Tenendum.* 4. *Reddend.* 5. The clauſe of *warrant.* 6. The *in cujus rei teſtimonium ſigillum, &c.* 7. The date. 8. The clauſe of *his teſtibus.*

The office of the premiſe of the deed is twofold, 1. Rightly to name the Feoffor and the Feoffee; and 2. to comprehend

hend the certainty of the lands to be conveyed, &c. Either by expreſs words, or which may by reference be reduced to a certainty, for *certum eſt quod cert. reddi poteſt, &c. Vide libr.* The Seal is of the eſſential part of the deed. The date many times antiquity omitted, for that the limitation of preſcript or time of memory did often in proceſs of time change, and the law was then holden that a deed bearing date before the limited time of preſcript, was not pleadable; and therefore they made their deeds without date, to the end they might alledge them within the time of preſcription. The date was commonly added in the Reign of *Ed.* 2. & 3. (6. a.) *quæ ſunt minoris culpæ ſunt majoris infamiæ. Reg.* he that loſeth *liberam legem*, becometh infamous, and can be no witneſs: As if a Champion in a writ of right become recreant or coward. But oftentimes a man may be challenged to be of a Jury, that cannot be challenged to be a witneſs, and therefore though the witneſs be of the neareſt alliance or kinred, or of counſel, or tenant, or ſervant to either party, (or any other exception that maketh him not infamous, or to want underſtanding, or diſcretion, or a party in intereſt) though it be proved true, ſhall not exclude the witneſs to be ſworn. 22 *Aſſ.* 12. 41. If a witneſs be outlawed in a perſonal Act, he cannot be joyned to the Jury; but yet that is no exception againſt him to exclude him to be ſworn as a witneſs to the Jury; for that he with others ſhould joyn in verdict with the Jury in affirmance of the deed, the party ſhould be barred of his attaint, becauſe there is more than twelve, that affirm the verdict. But note, there muſt be more than one witneſs, that ſhall be joyned to the enqueſt, *Inſt.* 6. b.

Max. Witneſſes cannot teſtify a negative, but an affirmative; when a trial is by witneſſes, the affirmative ought to be proved by two or three witneſſes, as to prove a ſummons of the Tenant, or the challenge of a Juror, &c. But when the trial is by verdict of twelve men, there judgment is not given upon witneſſes, &c. but upon the verdict, &c.

Probatio duplex { *viva, ſc. per teſtes,* / *mortua par chartas, &c.* } { *præſumptio triplex.* } { 1. *Violenta.* 2 *Probabilis.* 3. *Levis ſeu temeraria.* }

Many times Juries together with other matters, are much induced by preſumptions. In caſe of a Charter of feoffment if all the witneſſes be dead, *&c.* Then violent preſumption which ſtands for a proof, is continual and quiet poſſeſſion: for, *ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta.* Alſo the deed may receive credit *per collationem ſigillorum ſcripturæ, &c.* Glan. l. 10. c. 12.

A wife cannot be produced either againſt, or for her husband, *quia ſunt duæ animæ in carne una.* In ſome caſes women are by Law wholly excluded to bear teſtimony, as to prove a man to be a Villain. *Mulieres ad probationem Status hominis admitti non debent.* Fleta, l. 2. c. 44.

In an information upon the ſtatute of uſury, the party to the uſurious contract, ſhall not be admitted to be a witneſs againſt the uſurper, for in effect he ſhould be *teſtis in propria cauſa*, and ſhould avoid his own bonds, *&c. Smith's caſe, T. 8. J.* in *C. B. & Brit.* 134. He that challengeth a right in the thing in demand, cannot be a witneſs; for that he is a party in intereſt. *Britton, fol.* 134. (6. b)

Tenementum, is a large word not onely to paſs Lands and other inheritances which are holden, but alſo offices, rents, commons, profits, apprehender out of lands, *&c.* wherein a man hath any frank-tenement, and whereof he is ſeiſed *ut de libero tenemento.* But *hæreditamentum*, is the largeſt word of all in that kind, for whatſoever may be inherited, is an *hæreditamentum*, be it corporeal or incorporeal, real, or perſonal, or mixt.

(6. a.) If a man by deed give lands to another, and to his heirs, without more ſaying, this is good, (*ut res magis valeat, quam pereat*) if he put his ſeal to the deed, deliver it, and make livery accordingly. So it is if *A.* give lands, to have and to hold to *B.* and his heirs, this is good by conſtruction

ſtruction of the law: but when form and ſubſtance concur, then is the deed fair and abſolutely good. *(fol.7.a.)* In ancient charters, *&c.* there was never mention made of the delivery of the deed, or any livery of ſeiſin indorſed: for the witneſſes named in the deed, were witneſſes of both, *ib.*

Witneſſes are very neceſſary, for the better ſtrengthning of deeds, *fol.*7.b.

Hæres legitimus eſt quem nuptiæ demonſtrant, and is he to whom lands, tenements, and hereditaments, by the act of God, and right of bloud, do deſcend of ſome eſtate of inheritance, for *Solus Deus facere poteſt hæredem non homo*; *hæres ab hærendo, nam qui hæres eſt, hæret, vel dicitur ab hærendo quia hæreditas ſibi hæret, &c. Vide libr. Partus cui natura aliquantulum ampliaverit vel diminuerit, non tamen ſuperabundanter, bene debet inter liberos connumerari. Si inutilia noſtra reddidit, ut ſi membra tortuoſa habuerit, non tamen is partus monſtroſus.* Bract. *l.* 5.*f.* 437.

A denizen by the King's Letters Patents, cannot be heir, *&c.* But otherwiſe is it, if he be naturaliz'd by Act of Parliament: and if one be made denizen, the iſſue that he hath afterwards ſhall be heir to him. An alien cannot be heir, *&c. Propter defectum ſubjectionis.* Fol. 2.8.a.

Where the Sons by no poſſibility can be heir to the Father, the one of them ſhall not be heir to the other; as if an alien cometh into *England*, and hath iſſue, *&c.* l.7. *Calvin's* Caſe.

A man attainted of Treaſon or Felony can be heir to no man, nor any man heir to him, *propter delictum.* A man hath iſſue two ſons, and after is attaint, *&c.* And one of the ſons purchaſe lands, and dieth without iſſue, the other brother ſhall be his heir, for the attainder, *&c.* corrupteth the lineal bloud onely, and not the collateral bloud between the brethren which was veſted in them before the attainder. But if a man after he be attainted have iſſue, *&c. Autrement eſt.* In caſe, where *filiatio non poteſt probari*, the child may chuſe his Father.

A man by the Common-law, cannot be heir to Goods or Chattels, for *hæres dicitur ab hæreditate. Hæres aſtrarius:* ſo

called *ab aſtre, i.e.* an harth of an houſe; *cum Anteceſſor reſtituat hæredi in vita ſua hæreditatem, &c.* fol. 8. b.

Si uxor dicit ſe eſſe prægnantem de ipſo defuncto cum non ſit, habeat hæres brevium de ventre inſpic. nemo eſt hæres viventis; apparens dicitur.

If a man give land unto two, *& hæredibus*, omitting *ſuis*, they have but an eſtate for life, for the uncertainty. 10 *H.6.* 7. *Pl. Com.* 28. b.

Ceux parolx (ſes heirs) tantſolement font leſtate denheritance en touts Feoffments and Grants.

Here *Littleton* treateth of purchaſes by natural perſons, and not of bodies politique or corporate.

As the heir doth inherit to the anceſtor, ſo the ſucceſſor doth ſucceed to the predeceſſor, and the executor to the Teſtat.

An ancient grant muſt be expounded, as the law was taken at the time of the grant. 17 *E.* 3. 25. b.

Sub vocabulis (hæredibus ſuis) ſomnes hæredes propinqui comprehenduntur, & remoti, nati, & naſcituri. fo. 9. *a. Fleta. l.* 3. c. 8.

The Law is preciſe in preſcribing certain words to create an eſtate of inheritance, for avoiding of uncertainty, the mother of contention and confuſion. *Pl. Com.* 163.

There be many words ſo appropriated, as that they cannot be legally expreſſed by any other words, *&c.* Some to eſtates of lands; ſome to tenures; ſome to perſons; ſome to offences; ſome to forms of original writs; ſome to warrant, *&c.*

Status dicitur à ſtando. An eſtate of inheritance granted by the great Seal, *&c.* is deſcendible according to the courſe of the common law.

Hæreditas eſt duplex.
- *Corporata, viz.* Of Lands and Tenements, which may paſs by Livery, by Deed, or without Deed.
- *Incorporata*, as Advowſons, Commons, *&c.* which cannot paſs by Livery, but by Deed.

The Deed of incorporate inheritances doth equal the livery of corporate.

Al

Al I.S. habend. ſibi & ſucceſ. ſive hæred. ſuis e' fee s. Si ſoit per Letters Patents.

A conveiance by Feoffment cleareth all diſſeiſins, abatements, intruſions, and other wrongfull or defeaſible eſtates, where the entry of the Feoffor is lawfull, which neither fine, recovery, nor bargain and ſale by deed indented and inrolled doth. Sometimes, when an eſtate of freehold onely doth paſs improperly it is called a Feoffment.

Done eſt noſme general plus que neſt feoffment, car done eſt general à touts choſes moebles & nient moebles, Feoffment eſt riens forſque del ſoil.

If a man deviſe lands to a man in *perpetuam*, or to give, and to ſell, *&c.* A fee ſimple doth paſs by the intent of the deviſor. *Fol.* 9. b.

A man deviſeth lands to one *& ſanguini ſuo*, that is, a fee ſimple, but if it be *ſemini ſuo*, it is an eſtate tail. *Br. tit. tail.* 21.

So that, *ceux parolx (ſes heirs tantſolement, &c.)* Extend not 1. To the laſt Wills and Teſtaments. 2. Not to a fine, *ſur conuſans de droit come ceo, &c.* 3. Nor to certain releaſes. 4. Nor to a recovery. 5. Nor to a creation of Nobility by Writ.

But out of this rule of our Author, the law doth make divers exceptions; as, 1. If the Son infeoff the Father, as fully as the Father infeoffed him. 2. In reſpect of the conſideration, as if lands be given in frankmarriage generally. 3. If a feoffment or grant be made to any corporation aggregate of many perſons capable. 4. In caſe of a ſole Corporation, as if a feoffment in fee be made to a Biſhop, *habendum, &c. In libera eleemoſyna.* 5. In grants ſometimes, as if one coparcenor for owelty of partition grant a rent to the other generally, *&c. Ipſæ etenim leges cupiunt ut jure regantur.* 6. By the Forreſtlaw, if an Aſſart be granted by the King to another *habendum & tenen. ſibi in perpetuum*, he hath a fee ſimple without this word (heirs) *fol.* 10. a.

And this rule, *&c.* extendeth to the paſſing of eſtates of inheritances, in exchanges, releaſes, or confirmations that enure by way of enlargement of eſtates, warranty, bargains

and ſales by deed indented and inrolled, *&c.* In which, this word (heirs) is alſo neceſſary, for they do *tant amount* to a Feoffment or grant, *& ubi eadem ratio, ibi idem jus.*

A man may purchaſe lands to him and his heirs, 1. By Feoffment. 2. By Grant. 3. By Fine which is a Feoffment of Record. 4. By common recovery, in nature of a Feoffment of recovery. 5. By Exchange. 6. By Releaſe to a particular Tenant. 7. By Confirmation, *&c.* which are in nature of Grants, *&c.* 8. By bargain and ſale by deed, *&c.* Ordained by Statute. 9. By deviſe, by cuſtome of ſome particular place, and by Will in Writing, generally by authority of Parliament. 27 *H.* 8. *ca.* 16. 32 *H.* 8. *ca.* 2. 34 *H.* 8. *cap.* 5.

If a diſſeiſin, abatement, or intruſion be made to the uſe of another; if *ceſtuy que uſe* agreeth thereunto in *pays*, by this bare agreement he gaineth a Fee Simple without any livery of ſeiſin, *&c.*

Sect. 2.

Linea recta ſemper præfertur tranſverſali. Proximus excludit propinquum, & propinquus remotum, & remotus remotiorem, fol. 10. b.

Proximum Sumitur duplici ſc.
- *Jure propinquitatis*, and he that is, thus next, *&c.* is mediately inheritable.
- *Jure repreſentationis*, and ſo one is immediately inheritable, and accounted in Law next of bloud.

A Leaſe for life is made to *A.* the remainder to his next of bloud, in this caſe, he that is next of bloud, and capable by purchaſe, ſhall have the remainder, though he be not legally next to take as heir by deſcent; note the diverſity.

Sect. 3.

Maxime ſo called, *quia maxima eſt ejus dignitas & certiſſima autoritas, atque quod maximè omnibus probetur.* Pl. com. 27.

Lineal aſcent is prohibited by the Law, but not Collateral, *&c. fo.* 11. a.

Lit.

Littleton's proofs and arguments drawn from the common law, are firſt, from the maxims, rules, intendment and reaſon of the common law. 2. *Ab autoritate & pronunciatis.* 3. *A reſcriptis valet argumentum.* 4. From the form of good pleading. 5. From the right entry of judgments. 6. *A præcedentibus approbatis & uſu.* 7. *A non uſu.* 8. *Ab artificialibus argumentis conſequentibus & concluſionibus.* 9. *A communi opinione jurisprudentium.* 10. *Ab inconvenienti.* 11. *A diviſione, vel ab enumeratione partium.* 12. *A Majore ad minus, & à minore ad majus, à ſimili, à pari.* 13. *Ab impoſſibili.* 14. *A fine.* 15. *Ab utili, vel inutili.* 16. *Ex abſurdo.* 17. *A natura & ordine naturæ.* 18. *Ab ordine religionis.* 19. *A communi præſumptione.* 20. *A lectionibus juriſprudentium.*

From Statutes his Arguments and proofs are drawn. 1. From the rehearſal or preamble of the Statute. 2. By the body of the law diverſly interpreted, ſometimes by other parts of the ſame Statute, which is *benedicta expoſitio, & ex viſceribus cauſæ*; Sometime by reaſon of the Common-law.

But ever the general words are to be intended of a lawfull act, and ſuch interpretation muſt ever be made of all Statutes, that the innocent may not be damnified, *&c. fol.* 11. b.

There be divers laws in *England*: As firſt, *lex Coronæ.* 2. *Lex & conſuetudo Parliamenti.* 3. *Lex naturæ.* 4. *Lex communis Angliæ.* 5. Statute Law. 6. *Conſuetudines.* 7. *Jus belli, in republica maxime conſervanda ſunt jura belli.* 8. Eccleſiaſtical, or Canon Law in Courts in certain caſes. 9. Civil Law in certain caſes, onely in Courts Eccleſiaſtical, but in the Courts of the Conſtable, and Marſhal, and of the Admiralty. 10. *Lex Foreſtæ.* 11. The Law of Marque or Repriſal. 12. *Lex Mercatoria.* 13. The Laws and Cuſtoms of the Iſles of *Jerſey*, *Gernſey*, and *Man.* 14. The Law and privilege of the Stannery. 15. The Laws of the Eaſt, Weſt, and middle Marches, which are now abrogated.

A man that claimeth as heir in fee ſimple to any man by deſcent, muſt make himſelf heir to him that was laſt ſeiſed of the actual freehold, and inheritance; where the uncle

cannot get an actual poſſeſſion by entry, or otherwiſe, there the Father cannot inherit, *&c.*

Warranties ſhall deſcend to him that is heir at the commonlaw. *Fol.* 12. a.

And a warranty ſhall not go with Tenements, whereunto it is annexed to any ſpecial heir, but to the heir at the commonlaw.

Sect. 4.

None ſhall inherit any lands as heir, but onely the bloud of the firſt purchaſer. *Plow.* 447. *refert à quo fiat perquiſitum.* Fleta. l. 6. c. 1. 2. Bract. l. 2. fo. 65, 67.

Multa tranſeunt cum verſitate, quæ per ſe non tranſeunt (vid. libr. fo. 12. b. 5 *E.* 2. *Avowry* 207.) Whenſoever lands do deſcend from the part of the Mother, the heirs of the part of the Father ſhall never inherit, *& è converſo,* 39 *E.* 3. 29. fol. 13. a.

Eſcheat, i. e. cadere, excidere, vel accidere, quod accidit duobus modis, aut per defectum ſanguinis; aut per delictum tenentis, atque illud eſt.

Per judicium tribus modis. { *aut quia ſuſpenſus per collum.* / *aut quia abjuravit regnum.* / *aut quia utlagatus.*

In an appeal of death, *&c.* hanging the Proceſs, the Defendant conveyeth away the land, and after is outlawed, the conveyance is good, and ſhall defeat the Lord of his eſcheat; but otherwiſe is it if a man be indicted of felony, *&c.* for in the caſe of Appeal the Writ containeth no time when the felony was done, and therefore an eſcheat can relate but to the outlawry pronounced; but the indictment containeth the time when the felony was committed, and therefore the eſcheat upon the outlawry ſhall relate to that time.

If lands holden of *I. S.* be given to a Dean and Chapter, Major and Commonalty, and to their ſucceſſors, *&c.* And after ſuch body politick or incorporate is diſſolved, the donor ſhall have again the land, (for that the cauſe of the gift

gift or grant faileth:) and not the Lord by eſcheat. But no ſuch condition is annexed to the eſtate in fee ſimple veſted in any man in his natural capacity, but in caſe where the donor or feoffor reſerveth to him a tenure, and then the law doth imply a condition in law by way of eſcheat. *fol.* 13. b.

Sect. 5.

Deſcent is a means whereby one doth derive him title to certain lands, as heir to ſome of his Anceſtors. *Quod prius eſt, dignius eſt, & qui prior eſt tempore, potior eſt jure.*

Sect. 6.

Nul auna tren. de fee ſimp. per diſcent come heir, &c. Si non que il ſoit heir dentier ſange.

The half bloud, is no bloud inheritable by deſcent, being not compleat and perfect. *Fol.* 14. a.

Sect. 8.

Lands, *&c.* ſhall deſcend to him that can make himſelf heir to him that was laſt actually ſeiſed of the Freehold of the land, *&c.* *Fol.* 15. a.

Whether the ſeiſin of a rent reſerv'd upon a ſeiſe for life be ſuch an actual ſeiſin of the land in the eldeſt ſon, as the ſiſter in a writ of right may make her ſelf heir of this land to her brother; admitting there be ſon and daughter by one venter, and a ſon by another venter. *Vid. lib. Qu.* 7 *H.* 5. 34. *per Hals & Lodington.* * 35 *Aſſ. p.* 2.

When an entry ſhall veſt or deveſt an eſtate, there muſt by ſeveral entries into ſeveral parcels of land, *&c.* but when the poſſeſſion is in no man, but the freehold in law is in the heir that entreth, there the general entry into one part reduceth all into his actual poſſeſſion. *Fol.* 15. b.

Poſſeſſio fratris de feodo ſimplici facit fororem eſſe hæredem. 11 *H.* 4. 11. *l.* 3. Ratcliff's *caſe.*

All the lands and poſſeſſions whereof the King is ſeiſed *in Jure Coronæ*, ſhall *ſecundum jus Coronæ*, attend upon and follow the Crown.

The quality of the perſon doth alter the deſcent.

Sect. 9.

Sect. 9.

Inheritance is not onely intended, where a man hath Lands, *&c.* By deſcent of inheritage, but alſo by purchaſe. *Fol.* 16. *a.* 7 *H.* 4. 5. * 6 *E.* 3. 30.

A man may have inheritance in title of Nobility, by creation, by deſcent, and by preſcription. By Creation, by Writ and by Letters Patents. If he be called by Writ to the Parliament, he hath a fee ſimple, in the dignity, *&c.* Without any words of inheritance, but if he be created by Letters Patents, the ſtate of inheritance muſt be limited by apt words, or elſe the grant is void. The creation by Writ is the ancienter, by Letters Patents the ſurer, for he may be ſufficiently created by Letters Patents, and made noble, albeit he never ſit in Parliament.

Si mulier nobilis nupſerit ignobili deſinit eſſe nobilis; that is if ſhe gain her Nobility by marriage. But if a woman be noble by deſcent, *&c.* It is otherwiſe. *Fol.* 16. b. *l.* 4. 118. *Actons Caſe.*

Littleton citeth no Authority, but when the Caſe is rare, or may ſeem doubtfull; *Perſpicua vera non ſunt probanda.* Vide Librum, *&c.*

Sect. 10.

Placitum, à placendo, quia bene placitare ſuper, omnes placet. Fol. 17. a.

Seiſed, is properly applyed to Freehold, poſſeſſed, to Goods and Chattels. *Bract. lib.* 4. *f.* 263.

Demain, of the hand, *i. e.* manured by the hand, or received by the hand.

Seiſitus, &c. in dominico ſuo ut de feodo, ſc. de tres, &c. De queux home poit aver un manuel occupation, &c. Seiſitus ut de feodo ſc. de Advowſon, &c.

Ut de feodo, is to be underſtood poſitively; where *(ut)* denotat *ipſam veritatem, & non ſimilitudinem rei. Idonea perſona,* for the diſcharge of the Cure ſhould be preſented freely, *&c.* By the Patron, Guardian in Socage ſhall not preſent to an Advowſon becauſe by the Law he can meddle with nothing, that he cannot account for. *Fol.* 17. b.

Advo-

Advocatio, is an advowing or taking into protection; *& eſt jus patronatus.* 7 E. 3, 4. 45 E. 3. 5.

Two coparceners, one of them ſhall have a writ of right of Advowſon *de medietate advocationis*; for in truth ſhe hath but a right to a moity: but where there be two Patrons, and two Incumbents in one Church, each of them ſhall have a Writ of Advowſon *de advocatione medietatis.*

Two fee ſimples abſolute cannot be of one and the ſelf-ſame land, *fo.* 18. a.

Sect. 11.

And yet the ſeveral perſons by Act in law, a reverſion may be in fee ſimple in one, and a fee ſimple determinable in another by matter *ex poſt facto*; as if a gift in tail be made to a Villain, and the Lord enter, the Lord hath a fee ſimple qualified, and the donor a reverſion in fee; but if the Lord infeoff the donor, now both fee ſimple are united, and he hath but one fee ſimple in him: but one fee ſimple cannot depend upon another by the grant of the party: as if lands be given to *A.* ſo long as *B.* hath heirs of his body, the remainder over in fee, the remainder is void.

Sect. 12.

A purchaſe is always intended by title, and moſt properly by ſome kind of conveyance for money or ſome other conſideration, or freely of gift.

An heir-loom, is called *principalium* or *hæreditarium. Si un monument ſoit deface in leſgliſe, le heir del Anceſtor poit aver ſon action, &c.* 9 E. 4. 24.

CHAP. II.

De Fee Tail.

Sect. 13.

TAllium, derived of *tailler ſcindere. Modus & conventio vincunt legem.* Fol. 19. a.

Before the ſtatute of *Weſt.* 2. *De donis conditionalibus*, the heir

heir in tail had no fee ſimple abſolute at the common law, though there were divers deſcents. Annuities and ſuch like inheritances as cannot be intailed within the ſaid Statute, remain at the common law.

If the King before the ſtatute, *&c.* had made a gift in tail, *&c.* in this caſe, if the Donee had no iſſue, and before the ſtatute had aliened with warranty, and died, and the warranty had deſcended upon the King, this ſhould not have bound the King of his reverſion without aſſets: but otherwiſe it was in the caſe of a common perſon, *fol.* 19. *b.* 6 *E.*3.56. 45 *Aſſ. p.* 6. The King can do no wrong, *Pl. c.*246.

Sect. 14, 15.

Not onely all corporate inheritances which are or may be holden, but alſo all inheritances iſſuing out of any of thoſe inheritances, or concerning or annexed to, or exerciſible within the ſame though they lie not in tenure, may be intailed. As Rents, Eſtovers, Commons, *&c.* Or Uſes, Offices, Dignities which concern lands, or certain places, *&c.* But if the grant be of an inheritance meer perſonal, or to be exerciſed about chattels, and is not iſſuing out of land, *&c.* As the grant of an annuity of the office to be faulconer, maſter of horſe, *&c.* Such inheritances cannot be intailed, becauſe they ſavour nothing of the reality. *Fol.*20.*a.* 7 *E.*3.363.

In theſe caſes the grants, *&c.* hath a fee conditional, and by his grant or releaſe he may bar his heir, as he might have done at the common law, *viz.* In grant *de* perſonal inheritances. *Pl. C. Manxels c.*

Idem ſemper proximo antecedenti refertur. fol. 20. b.

Theſe words (*de ſon corps*) are not ſo ſtrictly required, but that they may be expreſſed by words that amount to as much. 5 *H.* 5. 6.

Voluntas donatoris in Charta doni ſui manifeſte expreſſa obſervetur. Quer. &c.

If a man make a charter of feoffment of an acre of land to *A.* and his heirs, and another deed of the ſame acre to *A.* and the heirs of his body, and deliver ſeiſin according to the

the form and effect of both deeds; it ſhall enure by moities, *i. e.* to have an Eſtate Tail in the one moity, with the Fee Simple expectant, and a Fee Simple in the other moity, *&c.* *Fol.* 21. *a.* 2 *H.* 6. 25. 45 *E.* 3. 20.

Sect. 17.

Robert gave the reverſion of lands, which *Agnes* his wife did hold for life to *Stephan de la More*, *Habendum poſt mortem dictæ Agnetis in liberum Maritagium cum Johanna filia ejuſdem Roberti*, and it is adjudged that is a good Eſtate Tail. 5 *E.* 3. 17.

Four things be incident to a frank-marriage. 1. That it be given for conſideration of marriage, *&c.* 2. That the woman or man, that is the cauſe of the gift, be of the bloud of the donor. 3. If the gift be made of a thing which lyeth in tenure (as of lands, *&c.* A rent Common, *&c.*) That the donees hold of the donor at the time of the Eſtate in frank-marriage made. 4. That the donees ſhall hold freely of the donor till the fourth degree be paſt, *fo.* 21. b.*

Theſe words (*in liberum maritagium*) did create an Eſtate in fee ſimple at the Commonlaw. And theſe are ſuch words of art and ſo neceſſarily required, as they cannot be expreſſed by words *æquipollent*, *&c.*

Sect. 18.*

Feodum talliatum, i. e. hæreditas in quandam certitudinem limitata, viz. Quel iſſue inheritra per force de tiels dones, & come longement lenheritance endurera.

A gift made to a man *& hæredi maſculo de corpore ſuo Reg. Judic. fol.* 6. *Hæredi uni de corpore*, *&c.* An exception from the rule, that all Eſtates Tail were fee ſimple at the Commonlaw. 39 *Aſſ. pl.* 20.

Sect. 19.*

Whenſoever the Anceſtor takes an eſtate for life, and after a limitation is made to his right heirs, the right heirs ſhall not by purchaſors, *fol.* 22. b. *Vide Libr. Non eſt hæres viventis.* And no diverſity when the Law creates the Eſtate for life, and when the party. A man ſeiſed of Lands in fee by

by Indenture makes a Leaſe for life, the remainder to the heirs male of his own body, this is a void remainder. So it is of a gift in tail, the remainder to his own right heirs for the reverſion is in the Anceſtor, who during his life beareth in his body all his heirs. And the donor cannot make his own right heir a purchaſer of an eſtate tail without departing of the whole Fee ſimple out of him. *Vide Libr.* Dyer 156.

If a man make a Feoffment in Fee to the uſe of himſelf in tail, and after to the uſe of the Feoff in Fee, the Feoffee hath no reverſion, but in nature of a remainder, albeit the Feoffor have the Eſtate tail executed in him by the Statute, and the Feoffee is in by the Commonlaw. *Dyer* 362. b.

Whoſoever is ſeiſed of Land hath not onely the eſtate of the Land in him, but the right to take profits, which is in nature of the uſe, and therefore when he makes a Feoffment in Fee without valuable conſideration to divers particular uſes, ſo much of the uſe as he diſpoſeth not is in him as his ancient uſe in point of reverter. *Fol.* 23. *a. Vide Libr.* Dyer. 12. Fealty is incident to every tenure (*exc. frankalm.*) and cannot be ſeparated from it.

Sect. 20.

Certain rules touching degrees, *&c.* The firſt is, That a perſon added to a perſon in the line of *conſanguinity* maketh a degree. 2. So as how many perſons there be, take away one and you have the number of degrees. 3. It is to be noted that in every line the perſon muſt be reckoned from whom the computation is made. *Vide Libr. gradus dicitur à gradiendo, quia gradiendo aſcenditur, & deſcenditur.* Fol. 24. a. *Vide, &c.*

Sect. 21.

Exempla illuſtrant, non reſtringunt legem. Æquitas eſt convenientia rerum, quæ cuncta coæquiparat, & quæ in paribus rationibus paria jura & judicia deſiderat; & jus reſpicit æquitatem. Æquitas enim eſt perfecta quædam ratio quæ jus ſcriptum interpretatur & emendat. Bract. *lib.* 4. *Fo.* 186.

Sect.

Sect. 22 *&* 23.

De dones fait en le tail, la volunt del donor ſer. obſerve. And theſe words (*queux doient inheriter*) imply a diverſity between a deſcent and a purchaſe. *Fol.* 24. b. *Vide Libr. Br. t. done* 42. *t. noſme* 1. *&* 40. A gift is made to a man, and to the heirs female of his body, the donee is capable by purchaſe, and the heir female by deſcent, *Fo.* 25. a.

Sect. 24.

Quæcunque que ſer. inheriter per force d'un done en le tail fait as heirs males, *covient conveier ſon title tout per les heir males. Fol.* 25. a. *Vide* 28 *H.* 6. *t. deviſe c.* 18. 1.*

A deviſe may create an inheritance by other words than a gift can, yet cannot a deviſe direct an inheritance to deſcend againſt the rule of Law. *Vide lib.*

In an eſtate Tail, *&c.* The male muſt make his conveiance by males, and the female by females.

If *A.* hath iſſue a ſon and a daughter, and dieth, and the ſon hath iſſue a daughter and dieth, and a Leaſe for life is made, the remainder to the heirs females of the body of *A.* in this Caſe the daughter of *A.* ſhall not take, becauſe ſhe is not heir. But albeit the daughter of the ſon maketh her conveiance by a male, ſhe ſhall take an Eſtate Tail by purchaſe, for ſhe is heir and a female. *Fol.* 25. b. 11 *H.* 6. 13. 9 *H.* 6. 25.

Sect. 25.

No croſs remainder, or other poſſibility ſhall be allowed by Law, where an Eſtate is once ſetled, *&c.* and taketh effect. As if lands be given to two husbands and their wives, and to the heirs of their bodies begotten, they have a joint Eſtate for life, and ſeveral inheritances. 24 *E.* 3. 29. a.

Sect. 29 *&* 30.

20 *H.* 6. 36. *Vide lib.* * 5 *H.* 4. 3. a. *Fol.* 26. b. A man by deed gave lands to *Em.* late wife of *I. M. habend. &c. prædict. E. & hæred. I. M. de corpore ejuſdem E. procreat.* In this caſe the ſon and heir of *I. M.* begotten on the body of *Em.* took no

no Eſtate with *Em.* in the lands, becauſe he was named after the *habendum.*

A man ſeiſed of two acres of land in fee ſimple hath iſſue two daughters and dieth, and the one coparcenor giveth her part to her ſiſter, and to the heirs of the body of her father.

In this caſe the donee hath an Eſtate Tail in the moity of the donors part; for the donor is not entire heir, but the donor is heir with the donee, and ſhe cannot give to the heirs of her own body, and the donor hath the other moity of her ſiſters part for life. *Les heirs, & ſes heirs differ.*

For if lands be given to the Son, and to his heirs of the body of his father, the ſon hath a fee ſimple. But if the land be given to the ſon, and to the heirs of the body of, *&c. e. eſt ta. f.* 27. a.

Sect. 31.

Every Eſtate tail within the ſtatute of *Weſtm.* 2. muſt be limited either by expreſs words, or words *æquipollent* of what body the heir inheritable ſhall iſſue. The grant of a ſubject ſhall be taken moſt ſtrongly againſt himſelf.* *Fo.* 27. b. *Vide libr.* 18 *Aſſ. p.* 5. Armories are deſcendible to the heirs males lineal or collateral.

CHAP. III.

Sect. 32.

TEnant is Tail after poſſibility of iſſue extinct, hath certain privileges in reſpect of the privity of his Eſtate, and of the inheritance that was once in him, which Tenant in Tail himſelf hath, and which Leſſee for life hath not. As 1. He is diſpuniſhable for waſte. 2. He ſhall not be compelled to atturn. 3. He ſhall not have aid of him in the reverſion. 4. Upon his alienation no writ of entry in *conſimili caſu*, lieth. 5. After his death no writ of intruſion doth lie. 6. He may

may joyn the miſe in a writ of Right in a ſpecial manner. 7. In a *præcipe* brought by him he ſhall not name himſelf Tenant-for life. 8. In a *præcipe* brought againſt him, he ſhall not be named barely Tenant for life, *fo.* 27. b.

And yet he hath four other qualities agreeable to a bare Leſſee for life, and not to an Eſtate in Tail. 1. If he make a Feoffment in fee, this is a forfeiture of his Eſtate. 2. If an Eſtate in fee, or in fee Tail, in reverſion or remainder, deſcend or come to this Tenant, his Eſtate is drowned, and the fee or fee Tail executed. 3. He in the reverſion or remainder ſhall be received upon his default. 3. An exchange between a bare Tenant, for life and him is good; for their Eſtates in reſpect of their quantity are equal, ſo as the difference ſtands onely in the quality.

The ſtate of this Tenant muſt be created, altered, *&c.* by the act of God, and not by the limitation of the party, *ex diſpoſitione legis, & non ex proviſione hominis. Vide Sect.* 33. *fol.* 28. a. l. 11. *Lewes Bowles.*

CHAP. IV.

Curteſie D'engleterre.

Sect. 35.

A Man ſeiſed of an advowſon or rent in fee, hath iſſue a daughter, who is married and hath iſſue, and dieth ſeiſed, the wife before the rent become due, or the Church void, dieth, ſhe had but a ſeiſin in law, and yet he ſhall be Tenant by the curteſie, becauſe he could by no induſtry attain to any other ſeiſin. *Et impotentia excuſat legem.*

But if the wife in this caſe dye before her entry into lands, *&c.* it is otherwiſe. *Vide lib. fo.* 29. a. *Dyer.* 55. 3 *H.* 7. 5.

A man ſhall not be tenant by the curteſie of a bare right, title,

title, uſe, or of a reverſion, or remainder expectant upon an Eſtate of Freehold, unleſs the particular Eſtate be determined during the coverture. * If an Eſtate of Freehold in Seigniories, Rents, Commons, *&c.* be ſuſpended, a man ſhall not be Tenant by the curteſie. As if a Tenant make a leaſe for life of the Tenancy to the Seignioreſs, who taketh husband and hath iſſue, the wife dieth, he ſhall not be Tenant *&c.* But if the ſuſpenſion be for years, he ſhall be Tenant by the curteſie, *fo.* 29. b. *Vide li.* 1 E. 3. 6. If a woman maketh a gift in Tail, and reſerve a rent to her and her heirs and the donor taketh husband and hath iſſue, and the donee dieth without iſſue, and the wife dieth, the husband ſhall not be Tenant by the curteſie of the rent; for that the rent newly reſerved, is by the act of God determined, and no Eſtate thereof remaineth. But if a man be ſeiſed in fee of a rent, and maketh a gift in Tail general to a woman, ſhe taketh husband and hath iſſue, the iſſue dieth, the wife dieth without iſſue, he ſhall be Tenant by the Curteſie of the rent, becauſe the rent remaineth, *fol.* 30. a.

Four things do belong to an Eſtate of Tenancy by the Curteſie, *viz.* Marriage, ſeiſin of the wife, iſſue and death of the wife. But it is not requiſite that theſe ſhould concur, *&c.* at one time, and therefore if a man taketh a woman ſeiſed of lands in fee, and is diſſeiſed, and then hath iſſue, and the wife die; he ſhall enter, and hold by the curteſie. So if he hath iſſue which dieth before the deſcent, *&c. Vide lib.* By the cuſtome of Gavelkind, a man may be Tenant by the curteſie without having any iſſue. 9 *E.* 3. 38.

If after iſſue, *&c.* in this caſe the husband maketh a feoffment in fee, and the wife dieth, the feoffee ſhall hold it during the life of the husband, and the heir of the wife ſhall not during his life in *ſur cui in vita*; for it could not be a forfeiture, for that the Eſtate at the time of the feoffment was an Eſtate of Tenancy by the Curteſie initiate and not conſummate, *Vid. l.* Dyer 363. 34 *E.* 3. *Cui in vita* 13.

In divers Caſes a man ſhall by having of iſſue, be Tenant by the Curteſie, where a woman ſhall not be endowed, *&c.* 7 *E.* 3. 6. 17 *Ed.* 3. 51.

A man

A man ſhall be Tenant by the Curteſie of a Common Sans number, but a woman ſhall not be endowed thereof. A man entitled to be Tenant by the Curteſie, maketh a feoffment in Fee upon condition, and entreth for the condition broken, and then his wife dieth, he ſhall not be Tenant, *&c.* for his title, *&c.* was incluſively abſolutely extinct by the Feoffment. * *Vide Librum. fo.* 30. b.

Trs ſont done al Baron & feme, & a les heireo que le baron ingenera de corps ſa feme, en ceo caſe ambideux ont eſtate en la T;ile, pur ceo que cen parol (heires) neſt limit a lun plius que a lautre.

Sect. 28.

Nul poit enre Tenant in Tail appears poſſibility d'iſſue extinct, *forſque un des donees ou le donee* en ſpecial tail*: ne un ques ſerra punie de waſt, pur lenheritance que fuit lun foits en luy. Mes ceſty en le reverſion poit enter, ſil alien en fee.*

Sect. 34.

Baron priſt feme enheritrix, Sil ad iſſue per luy ne viſe, il ſcera Tenant per le Curteſie.

I (truſt me) was even now ſo full of my Curteſie, that I had almoſt forgotten my craft in the tail, wot you what I mean? why, the two laſt *precedent Sections.* * If any before ſtay behind, I'll bring them after with a witneſs, *Thomas More, Thomas de la More Anteceſſor meus, miles, creatus fuit, in Parliamento, cum Edwardus Princeps ille niger, dux cornubiæ creatus fuerit. Anno Regni Reg. Edwardi tertii undecimo. Anno Dom.* 1337.

CHAP. IV.

Dower.

Sect. 36.

LA feme ſerra endowe de la 3. *part des trens, &c. que ſueront a ſa baron durant le coverture; iſſint que el paſſe l' ago de* 9. *ans al temps del mort ſa baron. lib.* 2. *fol.* 93. Bingham's Caſe.

Dower

Dower in the Common Law, is taken for that portion, &c. which the wife hath for term of her life of the Lands or Tenements of her husband, &c. *Propter onus matrimonii, & ad ſuſtentationem ſuiipſius & educationem liberorum, cum fuerint procreati, ſi vir præmoriatur. Dos, ex donatione, & eſt quaſi donarium*, becauſe the Law it ſelf doth (without any gift of the husband himſelf) give it to her; it is commonly taken for the third part which ſhe hath of her husband's Lands, &c. After his deceaſe. *lib. rub. c. 70. Bract. l. 2. ſ. 92.*

To the conſummation of this dower, three things are neceſſary, *viz.* Marriage, Seiſin and the death of her husband *ſ. 31. a.*

Secundum conſuetudinem regni mulieres viduæ, &c. Debent eſſe quietæ de tallagiis, &c. doti ejus parcatur, quia præmium pudoris eſt. Ockam. f. 40.

Where Lands and Tenements deſcend to the husband, before entry he hath but a ſeiſon in law, and yet the wife ſhall be endowed, for it lieth not in the power of the wife to bring to be an actual ſeiſon as the husband may doe of his wifes Land, when he is Tenant by the Curteſie *F. N. B.* 149.

Grandfather, Father and Son, the Grandfather, and Father die, &c. In this Caſe: *dos de dote peti non debet*; if Lands deſcend to the Father, otherwiſe is it in a purchaſe, if the Grandfather infeoff the Father, &c. *Vide lib. 5 E. 3. t. Douch.* 249. *Paris. c. Non debent mulieribus aſſignari in dotem caſtra quæ fuerunt virorum ſuorum & quæ de guerra exiſtunt, vel etiam homagia & ſervitia aliquorum de guerra exiſtentia.* Fo. 31. *b. Pat.* 1 *E.* 1. *Part.* 1. m. 17.

Tenant in Fee-tail general maketh a feoffment in Fee, and takes back an Eſtate to him and to his wife, and to the heirs of their two bodies, and they have iſſue, and the wife dieth, the husband taketh another wife, and dieth, the wife ſhall not be endowed, for during the Coverture, he was ſeiſed of an Eſtate Tail ſpecial, and yet the iſſue which the ſecond wife may have, by poſſibility may inherit. *Vide. lib.* 41 *E.* 3. 30. *Dyer.* 41.

Albeit of many inheritances that be entire, whereof no

diviſion can be made by metes and bounds, a woman cannot be endowed of the thing it ſelf, yet ſhe ſhall be endowed thereof in a ſpecial and certain manner. As of the third part of a *piſcary*, *tertium piſcem, vel jactum retis tertium*, *&c.* Fo. 32. a. 17 *E.* Dow. 104.

A woman ſhall not be endowed of a common ſans nomber en groſs, nor of an annuity, *&c.* Nor of Rents, *&c.* If the freeholds of the Rents were ſuſpended before the coverture. But a woman ſhall be endowed of Tithes of the third part of profits of Courts, Fines, Heriots, *&c.* *De nullo quod eſt ſua natura indiviſibile, & ſecationem ſive diviſionem non patitur nullam partem habebit, ſed ſatisfaciat ei ad violentiam*, Brac. 97. Brit. 146.

If the heir improve the value of the land by building, *&c.* And on the otherſide, if the value be impaired in the time of the heir, ſhe ſhall be endowed according to the value at the time of the aſſignment, and not according to the value, as it was in the time of her husband. 30. *E.* 1. *Vouch.* 298.

It is not neceſſary that ſeiſin ſhould continue during the coverture; for albeit the husband alieneth the lands, *&c.* or extinguiſheth the Rents, *&c.* Yet the woman ſhall be endowed. But it is neceſſary that the marriage continue, for if that be diſſolved the Dower ceaſeth. *Ubi nullum matrimonium, ibi nulla dos*; but this is to be underſtood when the husband and wife are divorced *à vinculo matrimonii*, as in caſe of precontract, conſanguinity, affinity, *&c.* And not *à menſa & thoro* onely, as for Adultery. In caſe of elopement, ſhe ſhall loſe her Dower, but ſhe is not barred of her appeal. *Sponte virum mulier fugiens & adultera facta Dote ſua careat, niſi ſponſo ſponte retracta.* Fol. 32. b. Mirr. ca. 5. *Sec.* 5. li. Intract 224. If a man ſeiſed of Lands in Fee took a wife, and infeoffed eight perſons, Writ of Dower was brought againſt theſe eight perſons, and two confeſs the action, and the other ſix plead in Bar, and deſcend to iſſue, the Demandant ſhall have judgment to receive the third part of two parts of the land in eight parts to be divided, and after the iſſue being found

for the demandant againſt the ſix, the demandant ſhall have judgment to recover againſt them the third part of ſix parts of the ſame land in eight parts to be divided, and ſo in ſome caſes, where the husband was ſole ſeiſed, the wife ſhall not be endowed in ſeveralty by metes and bounds. *M.* 2. and 3. *Eliz. Dyer.* 187. b.

Nota. The endowment by metes and bounds, according to the common right, is more beneficial to the wife than to be endowed againſt common right; for there ſhe ſhall hold the Land charged, in reſpect of a charge made after her title of Dower. It is neceſſary for the wife after the deceaſe of her husband, as ſoon as ſhe can to demand Dower before good teſtimony; for otherwiſe ſhe may by her own default loſe the value after the deceaſe of her husband, and her damages for detaining of her dower. *Vide. lib. Et Dotes ſuas habere non poſſunt ſine placito.* The mean values and damages are to be recovered againſt the Tenant in a Writ of Dower, *M.* 8. and 9. *Eliz. Rot.* 904. *conj. Banco. Vid. &c.*

If the wife be paſt the age of 9 years at the time of the death of her husband, (albeit he were but 4 years old) ſhe ſhall be endowed, *quia minor non poteſt dotem promereri, neque virum ſuſtinere; nec obſtabit mulieri petenti minor ætas viri.* So that albeit *conſenſus non concubitus facit matrimonium*, and that a woman cannot conſent before twelve, nor a man before fourteen. Yet this inchoate or imperfect marriage (from the which either of the parties, at the age of conſent, may diſagree) after the death of the husband ſhall give Dower to the wife, *Fo.* 33. a.

Eſt uxor de facto, & de jure. Fol. 33. b. *Vid. &c.* Onely ſhe that is a wife, *& de jure in favorem vitæ*, ſhall have an Appeal, *&c.* But a wife *de facto*, ſhall have Dower, if divorce be not had, *&c.* 50 *E.* 3. 15. 10. *E.* 3. 35.

Sect. 37.

Rationabilis dos eſt cujuſlibet mulieris de quocunque tenemento tertia pars omnium tru. &c. quæ vir ſuus tenuit in dominico ſuo ut de feodo, &c.

By

By the cuſtome of Gavelkind the wife ſhall be endowed of the moity, ſo long as ſhe keep her ſelf ſole and without child, which ſhe cannot wave, and take her thirds for her life: for *conſuetudo tollit communem legem, Stat. de conſuet. Cancia, &c.* And as cuſtoms may inlarge, ſo it may abridge and reſtrain it to a fourth part, *&c. Senentia ſignifieth widowhood*, fo. 43. b. *in fine marg.*

Sect. 39.

Affidare eſt fidem dare, & ſponſalia dicuntur futurarum nuptiarum repromiſſio & conventio.

But (this) Dower *ad oſtium eccleſiæ* is ever after marriage ſolemnized; for that before marriage the woman is not intituled to have Dower; certainty is the mother of quiet and repoſe, *Fol.* 34. b.

The Law hath provided, *quod vidua poſt mortem mariti ſui non det aliquid pro dote ſua, & maneat in Capitali meſſuagio mariti ſui per* 40. *dies poſt obitum mariti ſui, infra quos dies aſſignetur ei dos ſua niſi prius ei aſſignata fuerit, &c. & habeat rationabile eſtoverium ſuum interim in Communi*, yet becauſe there was no penalty, *&c.* inflicted, the Tenant of the Land may drive her to ſue for her Dower. *Mag. Chart. ca.* 7.

If the heir, *&c.* put her out within the 40 days, *&c.* She may have her Writ *de quarentina habenda.* A jointure made in ſatisfaction of Dower, is now the ſureſt way, *&c. Fol.* 34. b.

Whereſoever the Writ demands Land, Rent, *&c.* In certain, the demandant after judgment may enter or diſtrain before any ſeiſin delivered to him by the Sheriff upon a Writ of *habere facias ſeiſinam.* But in Dower, *&c.* the demandant cannot enter, *&c.* untill execution ſued, for the Writ demandeth nothing in certain. Aſſignment of Dower muſt either be by the Sheriff, by the King's Writ, or elſe by the heir or other Tenant of Land by conſent and agreement between them.

If the husband make ſeveral Feoffments of ſeveral parcels, and dieth, and one Feoffee aſſign Dower to the wife of parcel of Land in ſatisfaction, *&c.* The other Feoffees

ſhall take no benefit of this aſſignment, becauſe they are ſtrangers thereunto and cannot plead the ſame. But in that caſe, if the husband dieth ſeiſed of other lands in fee ſimple, *&c.* And his heir endoweth the wife of certain of thoſe lands in full ſatisfaction, *&c.* This aſſignment is good, and the ſeveral Feoffees ſhall take advantage of it. And therefore if the wife bring a Writ of Dower againſt any of them, they may vouch the heir, *&c.* So as there is a privity in this reſpect between the heir and the feoffees, and by this means, the ſame aſſignment may be pleaded by the heir that made it. 33 *Ed.* 3. *tit. Judgm.* 254, *&c.*

The aſſignment muſt be certain, and abſolute, and by ſuch as have a freehold, or againſt whom a Writ of Dower doth lie, *&c. fol.* 35. a. *Vide lib.*

There needeth neither livery of ſeiſin, nor writing to any aſſignment of Dower, becauſe it is due of Common right. Aſſignment muſt be of ſome part of the land, or of a rent, *&c.* iſſuing out of the ſame, *Dyer* 91.

Sect. 40.

Tenant for life of a carue of land, the reverſion to the father in fee, the ſon and heir apparent endoweth his wife, *&c. Ex aſſenſu patris.* Tenant for life dieth, the husband dieth, this is no good endowment, *&c.* becauſe the father at the time of the aſſent, had but a reverſion expectant upon a freehold, whereof he could not have endowed his own wife; and albeit the Tenant for life died, living the huſband, yet, *quod initio non valet, tractu temporis non convaleſcet.* Fo. 35. a.

If the heir apparent be within age, yet the endowment *ex aſſenſu patris* is good; but otherwiſe it is of Dower *ad oſtium eccleſiæ.* 2 H. 3. Dower 199. Fo. 35. b.

Ten things are neceſſarily incident to a deed, *viz.* Firſt, Writing. 2. In Parchment or Paper. 3. A perſon able to contract. 4. By a ſufficient name. 5. A perſon able to be contracted with. 6. By a ſufficient name. 7. A thing to be contracted for. 8. Apt words required by law. 9. Sealing. 10. Delivery.

Tra-

Tradition of a deed (onely) to the party to whom it is made, is ſufficient; and then when words are contrary to the act which is the delivery, the words are of none effect, *non quod dictum eſt ſed quod factum eſt inſpicitur.* But it may be delivered to a ſtranger as an eſcrow, &c. Becauſe the bare Act of delivery to him without words worketh nothing, *fol.* 39. *a. H.* 12. *R. in C. B.* Dyer 95.

Cartarum alia regia, alia privatorum, & regiarum alia privata, alia communis, & alia univerſitatis. Privatorum, alia de puro Feoffamento & ſimplici, alia de Feoff. conditionali, ſive conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra debent inſervire.

Carta non eſt niſi veſtimentum donationis, ſive orationis. Fleta l. 6. ca. 28. *Nemo tenetur armare adverſarium ſuum contra ſe. Scriptum eſt inſtrumentum ad inſtruendum quod mens vult. Carta eſt legatus mentis. Benignæ ſunt faciendæ interpretationes cartarum, propter ſimplicitatem laicorum, ut res magis valeat quam pereat.* Bract. l. 2. Fo. 94, &c.

Nihil tam conveniens eſt naturali æquitati quam voluntatem domini volentis rem ſuam in alium transferre ratam habere. Plow. Com. fo. 161. b.

Re, verbis, ſcripto, conſenſu, traditione Junctura veſtes ſumere pacta ſolent. Pl. Co. 161. *Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter eſt intelligendum. Verba debent intelligi ſecundum ſubjectam materiam. Carta de non ente, non valet.*

Sect. 41.

A jointure was no bar of Dower at the Commonlaw. For a right or title that one hath to a Freehold cannot be barred by acceptance of collateral ſatisfaction. But now by the ſtatute of 27 *H.* 8.

If a jointure be made to the wife according to the purview of that ſtatute, it is a bar of her Dower.

Six things are required to a perfect jointure. 1. It is to take effect for her life in poſſeſſion or profit preſently after

the deceaſe of her husband. 2. That it be for term of her own life, or greater Eſtate. 3. It muſt be made to her ſelf, and to no other for her. 4. It muſt be made in ſatisfaction of her whole Dower, and not of part, *&c.* 5. It muſt be either expreſſed, or averred to be in ſatisfaction, *&c.* 6. It may be made either before or after marriage. If the jointure be made before marriage, the wife cannot wave it, and claim her Dower at the Commonlaw; but if it be made after marriage, ſhe may wave the ſame, *&c.* *Fo.* 36. b. *Vide, &c.* Dyer. 358.

The wife ſhall not be barred of her jointure, albeit her husband commit Treaſon or Felony, as ſhe ſhall be of her Dower *ad oſtium Eccle. &c.* By the Commonlaw. But now at this day by the ſtatute of the 1 *Ed.* 6. *c.* 2. and 5 *Ed.* 6. *c.* 11. The wife of a man attainted of Felony ſhall not loſe her Dower.

A jointure made to the wife, under or above the age of nine years is good; and ſo if Dower *ad oſtium eccleſiæ, &c.* being made by aſſent, *&c.* *Conſenſus tollit errorem,* fol. 37. *a.*

Sect. 43.

Lou le certainty *appiert queux terres, &c.* *Feme avera per la* Dower, *la le feme entra apres la mort ſa baron, ſans aſſignment de nulluy.*

Sect. 45.

The wife ſhall not be endowed of Lands, *&c.* which her husband holdeth jointly with another at the time of, *&c.* Of his death: for the jointenant which ſurviveth claimeth the land by the feoffment, and by the ſurvivorſhip, which is above the Title of Dower, *&c.* But Tenants in common have ſeveral freeholds and inheritances, and their moities ſhall deſcend to their ſeveral heirs, and therefore their wives ſhall be endowed, *fol.* 37. b.

Sect. 46.

Liſſue en le Tail, *poit enter ſur la* poſſeſſion *la feme endowe ad oſt. eccleſ. apres la mort ſa baron.*

The

The husband is ſeiſed, *&c.* being within age, he cannot by a voluntary Act bind himſelf: but otherwiſe is it where he doth an Act, whereunto he is compelled by Law. *Fo.* 38. a. And ſo an Infant cannot endow his wife *ad oſt. eccl.* but he may endow her *ex Aſſ. patriæ*; becauſe the Father is ſole ſeiſed, *&c.* And the Son hath nothing, *&c.*

Sect. 48.

Guardian in Chivalry, *&c.* Is not poſſeſſed of the Land untill he doth enter, becauſe it is permanent; of the wardſhip of the body he is poſſeſſed before ſeiſure, becauſe it is tranſitory.

After the guardian hath entred, *&c.* A Writ of Dower lieth againſt him, and not againſt the heir who is Tenant of the Freehold; becauſe the Law hath truſted him to plead for the heir within age, that is in his cuſtody, and alſo for his own particular intereſt, *&c.* *Fo.* 38. b. *Vide & quære.* 44 E. 3. 13. 4 *H.* 6. 11.

If the heir (before the gardein enter) endow the wife of more than ſhe ought, and the gardein aſſign over his Eſtate, his Aſſignee ſhall have no Writ of Admeſurement, becauſe it was a thing in action: But the gardein himſelf ſhall have a Writ, *&c.* Stat. *Weſt.* 2. *ca.* 7.

And ſo ſhall the heir have a Writ, *&c.* At full Age: and ſome have ſaid, that in that caſe he may have it within age. *Fo.* 39. a *Vide*, &c. *F. N. B.* 149.

Judicium quaſi juris dictum, the very voice of Law and right, and therefore *judicium ſemper pro veritate accipitur.* In every judgment there ought to be three perſons, *actor*, *reus*, *& judex.* Fo. 39. *a.*

The common Law giveth this privilege to the Land holden by Knights ſervice, *viz.* That it ſhall not be diſmembred; but the whole Dower taken of the Lands holden in Socage, for that the Knights ſervice is for the defence of the Realm, which is *pro bono publico*, and therefore to be favoured.

Sect. 49. *Sect.* 50.

Lou le judgment eſt fait en Court le roy, ou en aut. Court, &c.

le feme poit perender ſes vicines & en lour preſence endow luy in per metes & bounds de la pluis beale,&c. *que el ad come gardein en ſocage, & cei en ſalvanon del Gardein en Chivelry durant le nonage l'enfant.*

Sect. 52.

If a Man taketh a Wife ſeiſed of Lands, *&c.* in Fee, hath iſſue, and after the Wife is attainted of Felony, ſo as the iſſue cannot inherit to her, yet he ſhall be Tenant by the Curteſie, in reſpect of the iſſue which he had before the Felony, and which by poſſibility might then have inherited. But if the Wife had been attainted of Felony before the iſſue, albeit he hath iſſue afterwards, he ſhall not be Tenant, &c. *Fo.* 40. *a.* Except the Wife be actually ſeiſed, the heir ſhall not make himſelf heir to the Wife, and this is the reaſon that a Man ſhall not be Tenant by the Curteſie of a ſeiſin in Law. *Lib.* 8. *fo.* 34. *in* Paines Caſe.

Sect. 53.

Si Teniments ſont dones a un home, & a les heires que il engendera de corps ſa feme, en tiel caſe la feme nad riens, &c. *Unc'ſi le baron devie ſans iſſue, me la feme ſer. endowe, per ceo que l'iſſue ; el per poſſibility puiſſoit au. per me le baron puit enheriter.*

A Man ſeiſed of land in general Tail, taketh Wife, and after is attainted of Felony, before the Statute of 1 *E.* 6. The iſſue ſhould have inherited, and yet the Wife ſhould not have been endowed: For the Statute of *Weſt.* 2. *ca.* 1. relieveth the iſſue in tail, but not the Wife in that caſe. But at this day if the Husband be attaint of Felony, the Wife ſhall be endowed, and yet the iſſue ſhall not inherit the lands which the Father had in Fee-ſimple. If the Wife elope from her husband, *&c.* ſhe ſhall be barred of her dower, and yet the iſſue ſhall inherit.

Sect. 55.

The Law hath inflicted five puniſhments upon him that is attainted of Treaſon or Felony. 1. He ſhall loſe his life by an infamous death of hanging, *&c.* 2. His Wife ſhall loſe her Dower. 3. His bloud is corrupted, his children made ignoble

ble if, &c. And cannot be heirs to him. 4. He ſhall forfeit all his Lands and Tenements. 5. All his Goods and Chattels. But the Wife of a Man attaint of Felony ſhall be endowed by force of the ſtatute in that caſe provided.

If the heir be vouched by the Tenant in the Writ of Dower in the gard of the gardein, The gardein ſhall plead it as well when he comes in as vouchee, as when he is Tenant. Alſo if the Lands holden in ſocage be not equal to the lands holden in chivalry, ſome ſay that the defendant in the Writ of dower, muſt have aſſets in her hands to the value of her Dower, ſo as he ſhall not be partly indower againſt the gardein, and partly retain in her own hands. 18 *E.* 3. 4. But by 25 *E.* 3. 52. b. *auterment eſt que eſt melior* opinion, &c.

CHAP. VI.

Tenant a Terme de vie.

Sect. 56.

IF Tenant *per terme dauter vie* dieth, living *ceſty que vie*, he that firſt entreth ſhall hold the land during that other Man's life; and he is in Law called an *Occupant*, becauſe his title is by his firſt occupation. And ſo if Tenant for his own life grant over his Eſtate to another, if the grantee dieth, there ſhall be an *Occupant*; ſo it is if Tenant by the Curteſie or Tenant in Dower grant over his Eſtate, or hers, &c. *Fo.* 41. *a. l.* 6. 37. *nullum tempus occurrit regi* in this caſe.

There can be no occupant of any thing that lieth in grant, and that cannot paſs without Deed, becauſe every Occupant muſt claim by a *que* eſtate, *& averr.* the life of *Ce' que vie.* It were good to prevent the incertainty of the eſtate of the Occup. to add theſe words (to have and to hold to him and to his heirs during the life of *Ce' que vie*) and yet the Leſſee may aſſign it to whom he will, or if he hath already an Eſtate for another Man's life without theſe words, then it were

good for him to assign his Estate to divers men and their heirs, during the life of *Ce' que vie.* Lit. 167. Dyer. 253.

If a Lease be made to *A*, &c. For term of his own life, and the lives of *B.* and *C.* the lessee hath but one freehold, which hath this limitation, during his own life, and the lives of two others; and here note a diversity between several Estates in several degrees, and one Estate with several limitations; for in the first, an Estate for a mans own life is higher than for another mans life; but in the second it is not. *l.* 5. *Rosses* case.

If Tenant for life infeoffe him in the remainder for life, this is a surrender, and no forfeiture; and albeit an Estate for term of a man's own life be but one Freehold, yet may several Freeholds in certain Cases be derived out of the same, *Vide libr.*

A. and *B.* jointenants, *A.* for life and *B.* in Fee, join in a Lease for life, *A.* hath a reversion, and shall join in an action of Waste. Tenant for life and he in the reversion join in a Lease for life, it is said that they shall join in an action of waste, and that the Lessee for life shall recover the place wasted, and he in reversion, damages. *Fo.* 42. a. *F. N. B.* 59. *F.* 13 *H.* 7. 15.

If a man make a Lease of a Manor worth 20 *l. per annum* to another untill 100 *l.* be paid, in this case, because the annual profits of the Manor are uncertain, he hath an Estate for life, if livery be made determinable upon the levying of a 100 *l. Fol.* 42. *a.*

And yet in some Cases a man shall have an incertain interest in Lands, *&c.* and yet neither an Estate for life, for years, or at will. As if a man by his will in writing devise his lands to his Executours for payment of debts, and untill his debts be paid; in this case the executours have but a Chattel, and an incertain interest in the Land untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a Chattel, it shall go to the executours of executours, *&c.* And so note a diversity between a devise and a conveiance at the Common Law in his life time. *l.* 8. *Mannings*

nings. The Law which abhorreth injury and wrong, will never ſo conſtrue any Act, *&c.* as it ſhall work a wrong; whenſoever the words of a Deed, or of the parties without Deed may have a double intendment, and the one ſtandeth with Law and Right, and the other is wrongfull and againſt Law, the intendment that ſtandeth with Law ſhall be taken, *Fo. 42. b.*

The Law more reſpecteth a leſſer eſtate by right, than a larger eſtate by wrong.

Tenant in tail made a Leaſe to another for term of life generally, and after releaſed to the Leſſee and his heirs; albeit between the Tenant in Tail and him a Fee ſimple paſſed, yet after the death of the Leſſor, the entry of the iſſue in Tail was lawfull; which could not be, if it had been a Leaſe for the life of the Leſſee, for then by the releaſe it had been a diſcontinuance executed.

Sect. 57.

Tenant *per vie ad frank-tenement, & null auter de meind. Eſtate.* Many that have capacity to take, have no ability to infeoffe, *&c.* As Aliens born, Traitours, Felons, *&c.* Idiots, Madmen, a Feme-covert, an Infant, a man by Dures, *&c.* For the feoffement, *&c.* of theſe may be avoided. *Brit. fo.* 88.

In judgment of Law, the King as King cannot be ſaid to be a minor, for when the Royal body politick of the King doth meet with the natural capacity in one perſon, the whole body ſhall have the quality of the Royal politick, *&c. omne majus trahit ad ſe quod eſt minus.*

A Licence for alienation grew by the Statute of the 20 *H.* 3. 20 *Aſſ. pl.* 17. by *Skipwith. vide lib.*

By the Statute 1 *E.* 3. *ca.* 12. *&* 34 *Ed.* 3. *cap.* 15. Although the King's Tenant in chief, *&c.* do alien all or any part without Licence, yet is there not any forfeiture of the ſame, but a reaſonable fine therefore to be paid.

The Statute of 18 *E.* 1. *De quia Emptor*, &c. hath in effect as to the common perſons, taken away the Statute of *Mag. Charta, cap.* 32. for thereby it is provided, *Quod liceat unicuiq; libero homini trans ſuas*, &c. *Seu partem inde ad voluntatem ſu-*

am vendere, ita quod Feoffatus teneat, &c. de capitali domino. Note firſt, that this word *liceat*, proveth that the Tenant could not, or at leaſt was in danger to alien parcel of his Tenancy, *&c.* upon the ſaid Act of *Mag. Charta.* 2. That upon the Feoffment of the whole, the Tenant ſhall hold of the chief Lord. 3. That the Tenant might enfeoffe one part to hold *pro particula* of the chief Lord. But this Act (the King being not named) doth not take away the King's Fine due to him by the Statute of *Mag. Charta.* Tenant by Statute Merch. Statute Staple, or *Elegit*, are ſaid to hold land, *ut liberum Tenementum*, untill their debt be paid; and yet they have no Freehold, but a Chattel, *&c.* But (*ut*) is ſimilitudinary, becauſe they ſhall by the Statutes have an Aſſ. as the Tenant of the Freehold ſhall have: and yet *nullum ſimile eſt idem.* 28. *Aſſ. p.* 7. *w.* 2. *c.* 18. *St. Merc.* 13 *E.* 1. 27 *E.* 3 *c.* 9. 23 *H.* 8. *c.* 6. *F. N. B.* 178.

CHAP. VII.

Tenant for Term of years.

Sect. 58.

THere be three kinds of perſons who at this day may make leaſes for three lives, or XXI. years, *&c.* which could not ſo doe when *Littleton* wrote: *viz.* 1. Any perſon ſeiſed of an eſtate tail in his own right. 2. Any perſon ſeiſed of an eſtate in Fee-ſimple in the right of his Church. 3. Any husband and wife ſeiſed of any eſtate of inheritance in Fee ſimple, or Fee tail in the right of his Wife, or jointly with his wife, before the coverture, or after: And theſe are made good by the Statute of 32 *H.* 8. But the Statute of 1 *Eliz.* 13 *El.* 18 *El.* and 1 *Reg. Jac.* are diſabling. *Vide libr.* &c. *l.* 5. *fo.* 6.

If two ſeveral Tenants of ſeveral Lands, join in a leaſe for years by Deed indenture, theſe be ſeveral leaſes, and ſeveral

ſeveral confirmations of each of them, from whom no intereſt paſſeth, and work not by way of concluſion in any ſort, becauſe ſeveral intereſts paſs from them. *Fol.* 45. *a. Vide & quære.*

Whenſoever any intereſt paſſeth from the party, there can be no eſtoppel againſt him. *H.* 44. *El. R.* 1459. *ca.* 8.

Leaſes for lives or years are of three natures, ſome be voidable by entry, and ſome void without entry. *Vide, &c.* 32 *H.* 8. *c.* 28. *l.* 3. 59. 60. 33 *H.* 8. Dy.

Entry. *Terminus* (in Law) doth not onely ſignifie the limits and limitation of time, but alſo the eſtate, and intereſt that paſſeth for that time. As if a man make a Leaſe for 21. years, and after make a Leaſe to begin *à Fine & expiratione prædicti termini*, &c. and after the Leaſe firſt made is ſurrendred, the ſecond Leaſe ſhall begin preſently: but if it had been to begin *poſt finem & expirationem prædict.* 21 *ann.* &c. the ſecond Leaſe ſhould not begin, till after the firſt Term, *&c.* be ended by *effluxion* of time. (*Fol.* 45.) *l.* 2. 154. *l.* 8. 145. *Pl. c.* 198.

Terminus annorum certus eſſe debet & determinatus. Id certum eſt quod certum reddi poteſt. 14 H. 8. 14.

The years muſt be certain when the Leaſe is to take effect in intereſt or poſſeſſion. *l.* 1. 155. 156. *l.* 6. 34. 35.

If the Parſon of *D.* make a Leaſe of his glebe for three years, and ſo from three years to three years, ſo long as he ſhall be Parſon, this is a good Leaſe for ſix years, if he continue Parſon ſo long, firſt for three years, and after that for three years; and for the reſt uncertain. *Terminus vitæ eſt incertus*, &c. And therefore if a Man maketh a Leaſe for 21 years, if *I. S.* live ſo long, this is a good Leaſe, and yet certain in incertainty. 1 *Pl. c.* 273.

Any eſtate for life, being an eſtate of Freehold, againſt whom a *Præc. quod redd.* doth lie, is an higher and greater eſtate than a Leaſe for years. *Fo.* 45. *b.*

Albeit a Leaſe for years muſt have a certain beginning and a certain end, yet the continuance thereof may be incertain, for the ſame may ceaſe and revive again in many Caſes. *Vide*, &c. (*Fo.* 46. *a.*) 6 *E.* 6. *Dy.* 72. accord.

If

If a *Feme covert* levy a fine alone, If the husband enter and avoid the fine, and die, the whole Eſtate is ſo avoided, as it ſhall not bind the wife after his death. If a woman be endowed of an Advowſon which is appropriated, and ſhe preſent, and her Incumbent is admitted, inſtituted, and inducted, albeit the Incumbent die, yet is the appropriation wholly diſſolved; becauſe the Incumbent which came in by preſentation, had the whole ſtate in him. 2 *E.* 3. 8. *per Scroop.*

A releaſe made to Tenant for years, is not good to him to increaſe his eſtate before entry; but he may releaſe the rent reſerved before entry, in reſpect of the privity.

Neither can the Leſſor grant away the reverſion by the name of the reverſion before entry. But the Leſſee before entry hath an intereſt, *intereſſe termini* grantable to another. (*Fo.* 46. *b.*) *Vide*, &c. *D.* 454. 567. If a leaſe be made to a Baron and *Feme* for term of their lives, the remainder to the executours of the ſurvivor of them, the husband grant away this term and dieth, this ſhall not bar the wife, for that the wife had but a poſſibility, and no intereſt. *H.* 17. *El. B. R.*

If a leaſe be made by Indenture, bearing date 26 *Maii*, &c. To have and to hold from the making hereof, or from henceforth, it ſhall begin on the day in which it is delivered, *&c.* But if it be *à die confectionis*, then it ſhall begin the next day after the delivery. *l.* 2. 5. *Pl. Com.* 148. *l.* 5. *Fo.* 1. *Dy.* 286. *&* 307. *l.* 5. *f.* 1.

A rent muſt be reſerved out of lands or tenements, whereunto the Leſſor may have recourſe to diſtrain, and therefore a rent cannot be reſerved by any common perſon out of any incorporeal Inheritance, as Advowſon, Common Offices, Corrodie, Mulcture of a Mill, Tythes, Fairs, Markets, Liberties, Privileges, Franchiſes, *&c.* But if the Leaſe be made of them by Deed for years, it may be good by way of contract, to have an Action of Debt; but diſtrain the Leſſor cannot. Neither ſhall it paſs with the grant of the reverſion, for that it is no rent incident to the reverſion. But if any rent be reſerved in ſuch caſe upon a Leaſe for life, it is void;

for

for that no action of debt doth lie. (*Fo.*47. *a.*) *l.* 7. 23. *l.* 10. 59. 30. *Aſſ. p.*5.

Note a diverſity between an exception, which is ever part of the thing granted, and of a thing in *eſſe*, and a reſervation which is always of a thing not in *eſſe*, but newly created or reſerved out of the Land or Tenement demiſed. *Ex verbo generali aliquid accipitur. Vide, &c.*

Valuable things ſhall not be diſtrained for rent, for benefit and maintenance of Trades, which by conſequent are for the Common-wealth, as cloth in a Taylors ſhop, *&c.* 7 *H.* 7. 1. b.

Nothing ſhall be diſtreſs for rent, that cannot be rendred again in as good plight, *&c.* but for damage feaſant it is otherwiſe, *Vide, &c.* 11 *H.*7.14. *a.* 21 *H.*7.39. b. & 4 *H.*2.15.

For rent due the laſt day of the Term, the leſſor cannot diſtrain, becauſe the Term is ended. *Fo.* 47. b.

Note a diverſity between a rent reſerved upon a Leaſe for years, reſerving a yearly rent: the leſſor may have ſeveral actions of dept for every years rent. But upon a bond or contract for payment of ſeveral ſums, no action of dept lyeth till the laſt day be paſt. In every contract there muſt be *quid pro quo*, for *contractus eſt quaſi actus contra actum. Vide, &c.* l. 2. 15. a.

If the leaſe be made by Deed Poll, the leſſee is not eſtopped to ſay that the leſſor had nothing at the time of the leaſe made; but if it be by Deed indented, then are both parties concluded, *&c.* 20 *E.* 4. 10. 2 *E.* 2. 253.

Si hom. pt. leaſe de ſon tr. dem per fet. indent. leſtop. ne continue apres le terme expire. M. 31. 32. *El. in* 8. *Fo.* 48. *a.*

Sect. 59.

Il ne beſoigne aſc' livery de ſeiſin deſire ſt. al leſſee per ans, mes il poit enter quant il voit per force de m. le Leas: mes lou franktenement paſſa. auterment eſt.

A livery in Deed, may be done either by a ſolemn act and words, as by delivery of the ring, or haſpe of the door, *&c.* And the Feoffor ſaying, here I deliver you ſeiſin and poſſeſſion

ſeſſion of this houſe, in the name of all the Lands and Tenements contained in this Deed, according to the form and effect of this Deed. Or by words without any ceremony or act; as the Feoffor being at the houſe door, or within the houſe, ſaying, here I deliver you ſeiſin, *&c.* in the name of ſeiſin and poſſeſſion of all the Lands, *&c.* contained in this Deed. For if words may amount to a livery within the view, much more it ſhall upon the Land. (*Fo.* 48. *a.*) 4. 41. *E.* 3. 17 *b.* 41. *Aſ. p.* 10. *l.* 6. 26.

Theſe words, *ſecundum formam carta*, are underſtood according to the quantity and quality of the effectual eſtate contained in the Deed. 7 *E.* 4. 25. 29. *Aſſ.* 40.

If *A.* by Deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs, this is a void Deed, becauſe he cannot reſerve to himſelf a particular eſtate; and conſtruction muſt be made upon the whole Deed, *&c.* *Fo.* 48. *b. Vide*, &c. *M.* 33, 34. *El. B. R. Hog. & Xs.*

A livery in Law is when the Feoffer ſaith to the Feoffee being in view of the houſe or land (I give you yonder Land to you and your heirs, and go enter, *&c.* and take poſſeſſion thereof accordingly) and the Feoffee doth accordingly in the life of the Feoffer enter, this is a good Feoffment, for *ſignatio pro traditione habetur.*

And livery within the view is good, where there is no Deed of Feoffment. 9 *E.* 4. 39. 38 *E.* 3. 11.

And note, a livery in Law, ſhall be perfected and executed by an entry in Law. 38. *Aſſ. p.* 23.

If a man be diſſeiſed, and make a writing of a Leaſe for years, and deliver the Deed, and after deliver it upon the ground, the ſecond delivery is void, for the firſt delivery made it a Deed; and for that the Leaſe of years muſt take effect by the delivery of the Deed, therefore the Deed delivered, when he was out of poſſeſſion, was void. But ſo it is not of a Charter of Feoffment, for that takes effect by the livery and ſeiſin. But if the Leſſor had delivered it as an eſcrowe, to be delivered as his Deed upon the ground, this had been good. (*Vide libr.*) *l.* 3. 35. *Jennings. Brag.*

Of

Of Freehold and inheritances ſome be corporeal, as lands, &c. theſe are to paſs by livery of ſeiſin, by Deed or without Deed; ſome be incorporeal, as Advowſons, Rents, Commons, &c. Theſe cannot paſs without Deed, but without any livery. *Et eſt traditio de re corporali de una perſona in perſonam de manu*, &c. *& quia non poſſunt res incorporales poſſideri ſed quaſi, ideo traditionem non patiuntur*, &c. Bract. *lib.* 2. *c.* 18.

In ſome caſes a Freehold ſhall paſs by the common law, without livery of ſeiſin: as if an houſe or Land belong to an office, by the grant of the office by Deed, the Houſe, &c. paſſeth as belonging thereunto. *Vide*, &c. So if the Houſe belong to a Corodie, by the grant of the Cor. the Houſe paſſeth. 31 *H.* 6. 16. 8 *H.* 7. 4.

Sect. 60.

Leaſe eſt fait per ans, le remainder ouſter a un auter per vie; en ceſt caſe livery de ſeiſin eſt requiſite, ou autrement riens paſſa a celluy en remainder.

But livery cannot be made to the next in remainder, becauſe the poſſeſſion belongs to the Leſſee for years; and for that the particular term, and all the remainders in law make but one eſtate, and take effect at one time, therefore the livery is to be made to the Leſſee. *Remanere*, is a reſidue of an eſtate depending upon a particular eſtate, and created together with the ſame. A man being abſent cannot take a Freehold by a livery, but by his Attorney being lawfully authoriſed to receive livery by Deed, unleſs the Feoffment be made by Deed, and then livery to one (Jointenant) in name of both is good. (*Fo.* 49. b.)

If a man deliver a Deed without ſaying any thing, it is good delivery, but to a livery of ſeiſin of land words are neceſſary. *Vide*, &c.

A man makes a Leaſe for years to *A.* the remainder to *B.* in Fee, and makes livery to *A.* within the view: this livery is void, for no man can take by force of a livery within view, but he that taketh the freehold himſelf.

By the entry of the Leſſee he is in actual poſſeſſion, and then

then the livery cannot be made to him that is in poſſeſſi
for, *quod ſemel meum eſt, amplius meum eſſe non poteſt, Vide,*
Affectio tua nomen imponit operi tuo. Bract. *lib.* 1.

But the diſſeiſor infeoff, the diſſee and others, albeit
diſſeiſee came to take livery, he is remitted to the whole.

Sect. 62. *&c.*

An exchange of Lands, *&c.* is good without livery of
ſin. And in caſe of a fine which is a Feoffment of Rec
of a deviſor by a laſt will, of a ſurrender of Releaſe,
confirmation to a leſſee for years, or at will. In all theſe
ſes and ſome other, a Freehold, *&c.* may paſs without li
ry, *Fo.* 50. *a.*

In exchanges many things are to be obſerved. 1. t
the things exchanged need not to be in *eſſe* at the time
the exchange made, (I grant a rent newly created out of
Lands in exchange, for the Manor of *D.*) this is a g
exchange. 2. There needeth no tranſmutation of poſſe
on, and therefore a releaſe of a rent, or eſtovers, or righ
Land in exchange for Land is good. 3. The things exch
ged need not to be of one nature, ſo they concern Lands
Tenements. As Land for rent or Common, *&c.* *Vide,*
Fo. 50. b. But annuities, *&c.* which charge the perſon on
cannot be exchanged, *&c.*

Sect. 64, and 65.

There be five things neceſſary to the perfection of an
change. 1. That the Eſtates given be equal, *viz.* that t
be equality of the quantity of the Eſtate, as if the one ha
Fee-ſimple, *&c.* the other ſhall have a like Eſtate, *&c.*
equality in value of lands in an exchange, is not requi
neither equality in the quality or manner of the Eſt
2. That this word (*excambium* exchange) be uſed, whic
ſo individually requiſite, as it cannot be ſupplied by an
ther word, or deſcribed by any *circumlocution.* 3. T
there be an execution by entry or claim in the life of
parties. 4. That if it be of things that lie in grant, it m

by Deed. 5. If the Lands be in ſeveral Counties, there ght to be a Deed indented; or if the thing lie in grant (as Advowſon, *&c.*) albeit they be in one County, *fol.* 51. *& b.*

The agreement of the parties cannot make that good which Law maketh void.

Sect. 66.

The intereſt of the term doth paſs and veſt in the Leſſee years before entry; and therefore the death of the Leſſor not deveſt what was veſted before.

Infants, Feme coverts, perſons attainted, outlawed, excommunicated, villains, aliens, *&c.* may be private Attorys to deliver ſeiſin, *fo.* 52. *a. vide & quære.*

The authority of an Attorney is twofold, expreſſed in his arrant, and implyed in law; both which he muſt purſue; and if he do leſs, it is void. 12 *Aſſ. p.* 24.

There is a diverſity between an Authority coupled with an tereſt, and a bare Authority. *fo.* 52. *b. vide, &c.*

The Cuſtome that enableth the Lord of a Manor to grant reater Eſtate, enableth him to grant a leſſer. *Omne majus tinet in ſe minus.* H. 36. El. R. 492. *Barnes B. R.*

A letter of Attorney may be contained in a Deed of ſeoffent, beginning, *Omnibus Chriſt. fidel. &c.* for one continent y contain divers Deeds to ſeveral perſons: but if it be by denture, *&c.* it is otherwiſe.

Though the Attorneys warrant be general, to deliver ſei-: yet he cannot deliver ſeiſin within the view; for his rrant is intendable (or implyed) in law, of an actual and preſs livery, and not of livery in law, *P.* 3. *El.* in *C. B.* in *cham's* caſe.

Oportet quod donationem ſequatur rei traditio, etiam in vita natoris, & donatorti. Bract. l. 2. fo. 16.

Therefore a letter of Attorney to deliver livery of ſeiſin er the deceaſe of the Feoffor, is void. But this is to be derſtood of ſole perſons, *&c.* and not of a Congregation gregate of many perſons capable. 18 *H.* 8. 3. 11 *H.* 7. 19.

Sect.

Sect. 67.

There be two kinds of Waſts, *viz.* Voluntary Actual, or Permiſſive. Waſte may be done in houſes pulling them down, or by ſuffering the ſame to be unc red.

If the Tenant doe or ſuffer Waſte to be done in houſes if he repair them before any action brought, there lieth action of Waſte againſt him; but he cannot plead, *quod fecit vaſtum*, but the ſpecial matter.

If the Tenant build a new houſe it is waſte, and i ſuffer it to be waſted, it is a new waſte, 42 *E.* 3. 21.

If the Tenant ſuffer the houſes to be waſted, and fell down Timber to repair the ſame, this is a double wa 44 *E.* 3. 44. *F.N.B.* 59. *B.*

Note, there is a Waſte, Deſtruction and Exile. W properly is in houſes, gardens, and in Timber-trees, eithe cutting of them down, or topping of them, or doing act whereby the Timber decaies. The cutting of dead wo that is, *ubi arbores ſunt aridæ, mortuæ, cavæ, non exiſtentes hemium, nec portantes fructus, nec folia in æſtate*, is no W *Dyer.* 332.

If the Tenant cut down underwood (as he may by L yet if he ſuffer the young germins to be deſtroyed, th deſtruction, 20 *E.* 3. *Waſte* 32. 10 *H.* 7. 2.

Exile or deſtruction of Villains, or Tenants at will, or king them poor, where they were rich when the te came in, whereby they depart from their tenures, is W *fol.* 53. *a. & b. vide libr.*

If the eſtate of the reverſion continueth not, but i tered, the action of Waſte, for Waſte done before (w conſiſts in privity) is gone.

An action of waſte doth lie againſt the Aſſignees of te by the Curteſie, and of tenant in Dower, and againſt the ſignee of the Guardian in Chivalry: in all other caſes th tion of waſte ſhall be brought againſt him that did the wa *fo.* 54. *a. vide*, &c.

An Infant, a Baron and Feme, ſhall be puniſhed for waſte
e by a ſtranger; and ſo ſhall the wife that hath the eſtate
ſurvivor, for waſte done by the husband in his life time, if
agree to the eſtate. *F. N. B. 36. b.*
f a leaſe be made to A. for life, the remainder to *B.* for
the remainder to *C.* in fee: After the death or ſurrender
B. in the mean remainder, an Action of waſte doth lie.
if a leaſe for life be made, the remainder for years, the re-
nder in fee, an Action doth lie preſently during the term
emainder.
But if a man make a leaſe for life or years, and after
nt the reverſion for years, the leſſor ſhall have no Action
waſte during the years; for he himſelf hath granted away
reverſion, in reſpect whereof he is to maintain his Acti-
Otherwiſe it is, if he had made a leaſe in reverſion,
ch had been but a future intereſt, &c. *Vide*, &c. 4 *E.* 3. 18.
tit. Waſte.
No Action of waſte lieth againſt a Guardian in Soccage,
an action of treſpaſs: Nor againſt Tenant by Statute
ple, &c. or *Elegit. Stat. Marlebridge, cap.* 17. *F. N. B.*
E.
See in the Regiſter five ſeveral writs of waſte; Two at
Common law, for waſte done by Tenant in Dower, or the
ardian; and three by ſpecial or ſtatute Law, for waſte
ne by Tenant for life, for years, and Tenant by the cour-
e.
Qui hæret in littera, hæret in cortice. Vide, &c. As tenant for
a year is within the remedy of *Stat. Glocest.* 5. which gi-
h waſte againſt a leſſee for life or years.
Leſſee for life, the remainder to him for 21 years, he hath
h eſtates in him ſo diſtinctly, as he may grant away either
them: For a greater eſtate may uphold a leſſer, but not
nverſo. fol. 54. *b.*
If a man make a leaſe for life to one, the remainder to
Executors for twenty one years, the term for years ſhall
t in him; For even as an Anceſtor and an Heir are *correla-*
a, as to inheritance (as if an eſtate for life be made to A. the
re-

remainder to *B.* in tail, the remainder to the right hei
A. the fee veſteth in *A.* as if it had been limited to
and his heirs) even ſo are the Teſtators and Executors
relativa as to any Chattel.

CHAP. VIII.

Of Tenant at will.

Sect. 68.

EVery leaſe at will muſt be in law, at the will of both
ties. *Poſſeſſio precaria & nuda & pro voluntate domi*
teſt revocari, fol. 55. *a. Fleta. l.* 3.

Tenant at will ſhall reap the crop which he ſowe
peace, albeit the leſſor doth determine his will before
ripe; for that the Eſtate of the leſſee is uncertain, and
good for the Commonwealth that the ground be ſown.
this is not onely proper to a leſſee at will; but to every
ticular Tenant that hath an Eſtate incertain. And there
if Tenant for life ſoweth the ground, and dieth, his ex
tors ſhall have the Corn. And the ſame law is for leſſe
years of Tenant for life. So if a man be ſeiſed of lan
the right of his wife, *&c.* his executor ſhall have the C
But if husband and wife be joynt-tenants of the land, and
husband ſoweth the ground, and the land ſurviveth to
wife, it is ſaid that ſhe ſhall have the Corn, *Dyer*, 316.

But where the Eſtate of the leſſee being incertain
defeaſible by a right Paramount, or if the leaſe deter
by the act of the leſſee, as by the Forfeiture, Condition,
There he that hath the right paramount, or that entreth
any forfeiture, *&c.* ſhall have the Corn. *fol.* 55. *b. l.* 5.

If a diſſeiſſor ſow the ground and ſever the Corn,
the diſſeiſſee re-enter, he ſhall have the Corn, becauſe
entreth by a former title, and ſeverance or removing of

rn altereth not the caſe; for the regreſs is a continuation the Freehold in him in judgment, of law from the begin-g.

If the husband and wife make a leaſe at will of the wifes d, reſerving a rent, and the husband die, yet the leaſe ntinueth. So if a Leaſe be made by two to two others at ill, and the one of the leſſors or of the leſſees die, the eaſe at will is not determined, *&c. l.* 5. 10. *Henſtead's* caſe, er. 269. *b.**

Quando lex aliquid alicui concedit, concedere videtur & id ſine res ipſa eſſe non poteſt, 14 H. 8. 2.

If the leſſee at will be diſturbed of his free entry, egreſs d regreſs to carry away his Corn, *&c.* he ſhall have his a-on upon his caſe, and recover his damages; for whenſoever e law giveth any thing, it giveth alſo a remedy for the ſame, 56. *a.*

Any Inhabitant of *Southwark* having by cuſtome a watring ace for Cattel, which being ſtopped, may have an action. *&c.*

Sect. 69. & *Sect.* 70, 71, & 72.

Meſſuagium, containeth Buildings, Curtelage, Or-ards and Garden. *A Præcipe* lieth not *de Domo*, but *de eſſuagio.*

Nothing that is contrary to reaſon is conſonant to Law.

Si home fait un ft. de feoffment de terre, &c. a un auter & de-ver a luy le fait, mes nemy livery de ſeiſin, en ceo caſe le feoffee ter, & tener a volunt, &c.

The leſſor hath no remedy at all againſt Tenant at will for rmiſſive Waſte, *fo.* 57. *a.* If Tenant at will grant over his ſtate, and the grantee enter, he is a deſſeiſſor, and the leſ-r may have an action of treſpaſs againſt him, though the rant is void, for the will is determined.

A Treſpaſs or Tranſgreſſion paſſeth that which is right. *ranſgreſſio eſt cum modus non ſervatur nec menſura: debet nim qualibet in ſuo facto modum habere, & menſuram. Nota,* n the loweſt offences there are no Acceſſories, but all are rincipals, as in Riots, Routs, Forcible entries, *&c.* and ſo in

in the higheſt offence, which is *Crimen læſæ Majeſtatis*, th
be no Acceſſories; but in Felonies there be Acceſſories b
before and after.

*Si le leſſor ſur tiel leas a volunt reſerve a luy un annuall r
il poit diſtr. per ſe rent arere, ou aver de ceo un action de de*

Note, he may diſtrain, *&c.* and yet it is no rent ſervi
for no Fealty belongeth thereunto, but a rent diſtrainable
common right, *fo.* 57. *b.*

Tenant at will is always by right, and Tenant at ſuffera
entreth by a lawfull leaſe, and holdeth over by wrong.
vide diverſitatem.

Note a diverſity between particular eſtates made by
terretenant, and particular eſtates created by act in law;
If a Guardian after the full age of the heir, continueth
poſſeſſion, he is not tenant at ſufferance, but an Abator,
gainſt whom an Aſſize of *Mortdanc.* doth lie, *&c.* *F. N.*
196.

CHAP. IX.

Tenant by Copy.

Sect. 73.

*TEnantes per Copie de Court-Roll ont uſe dau. terres, &c
eux & a lour heirs in fee, fee taile, ou a terme de vie,
a volunt le ſur. ſolonq; le cuſtome del Manor.*

Eundum veteres aut ex ſcripto qui Bockland; *aut ſine ſcr
qui* Folkland *dicebatur, poſſidebant.*

Curia, Court is a place where Juſtice is judicially admi
ſtred, and is derived *à cura, quia in curiis publicis curas ge
bant.* Court Baron, ſo called of the Baron who is Lord
the Manor, *fo.* 58. *a.* or for that it hath relation to the Fre
holders.

As there may be a Court Baron of Freeholders onely
witho

without Copiholders, and then is the Steward the Regiſter; So there may be a cuſtomary Court of Copiholders onely, *&c.* then is the Lord or his Steward the Judge.

And when the Court Baron is of this double nature, the Court Roll containeth as well matters appertaining to the cuſtomary Court, as to the Court Baron.

Manerium dicitur à manendo, ſecundum excellentiam ſedes magna fixa & ſtabilis. Et ſciendum eſt quod Manerium poterit eſſe per ſe ex pluribus edificiis coadjuvatum ſive villis & Hamletis adjacentibus. Poterit etiam eſſe Manerium & per ſe & cum pluribus villis, & cum pluribus Hamletis adjacentibus, quorum nullum dici poterit Manner. per ſe, ſed villæ ſuæ Hamletæ, poterit etiam eſſe per ſe Manerium Capitale, & plura continere ſub ſe Maneria non Capitalia, & plures villas & plures Hamletas quaſi ſub uno Capite, aut dominio ſuo. Bract. l. 4. *fo.* 212.

Tenant for years, Tenant by Statute Merch. Staple, *Elegit*, Gardian in chivalry, *&c.* who are not properly ſeiſed but poſſeſſed, are *domini pro tempore*, not onely to make admittance, but to grant voluntary Copies of ancient Copihold Lands which come into their hands. *Fo.* 58. b.

And in ſome ſpecial Caſe an Eſtate may be granted by Copy, by one that is not *dominus pro tempore*, *&c.* As if the Lord of a Manor, by his will in writing, deviſeth that his executor ſhall grant the Cuſtomary Tenements of the Manor according to the Cuſtome of the Manor for the payment of his debts, and dieth, the executor having nothing in the Manor, may make grants, *&c.* *Conſuetudo*, properly, ſignifieth a cuſtome, as here, *&c.* But legally it ſignifieth alſo *Tolles*, *Murage*, *Pontage*, *&c.*

Sect. 74 and 75.

Et tiel Tenant ne poit alien ſa terre per fait, &c. Fo. 59. *a.*

But when a man hath but a right to a Copihold, he may releaſe it by Deed or by Copy, to one that is admitted Tenant *de facto*. l. 4. 24. b. *Kite & Queinton.*

Foris facere i. e. extra legem seu consuetudinem facere, to do a thing against or without law or Custome, and that legally is called a forfeiture,

Si tiel tenant voit alien sa terre a un aut. il covient, &c. de surrender les tenements en asc' Court, &c. en le main le signior, al use celuy que at avera le state.

Ils nont auter evidence concernant lour tenements, forsque le Copies des Rolles de Court.

Of Fines due to the Lord by the Copyholder, some be by the change or alteration of the Lord, and some by the change of the Tenant; the change of the Lord ought to be by the Act of God, otherwise no Fine can be due, but by the change of the Tenant either by the Act of God, or by the Act of the party a Fine may be due. Of Fines taken of Copyholders, some be certain by custome, and some be incertain: but that Fine though it be *incertus*, yet must it be *rationabilis*. Fo. 59. b. *Vide, &c.*

The Lord of a Manor is described by *Fleta*, as he ought to be, in these words *Fleta, lib. 2. ca. 65. & 71.*

In omnibus autem & supra omnia decet quemlibet dominum verbis esse veracem, & in operibus fidelem, deum & justitiam amantem, fraudem & peccatum odientem, voluntariosque, malevolos & injuriosos contemnentem, & apud proximos pietatem vultum motibilem & plenum, ipsius enim interest potius consilio, quam viribus uti, propriove arbitrio: non cujuslibet voluntarii, juvenis meneſtralli vel adulatoris, sed jurisperitorum virorum fidelium & honestorum, & in pluribus expertorum consilio, debet favere. Qui bene sibi vult disponere & familiæ suæ, scire veram executionem terrarum suarum, necessarium erit, ut perinde sciat quantitatem suarum facultatum, & finem annuarum expensarum.

Quæ omnia distincte scribantur in membranis, ut perinde sagacius vitam suam disponat & facilius convincat mendacia computariorum.

Sect. 76, and 77.

If by Cuſtome, Copyhold may be intailed, the ſame by like cuſtome by ſurrender may be cut off.

Some have holden that there was a *Formedon* in the deſcender at the Commonlaw. 10 *E.* 2. *Formedon.* 55, *&c.*

Si le ſignior ouſta tiels tenants, &c. ils nont aut. remedy, forſque de ſuer a louer ſigniors per Petition; car auterment ils ne ſerrent dits tenants a volunt le Seignior, &c. Mes le Seignior voile enfreind le Cuſtome que eſt reaſonable en tiel caſe. Mes Brian. *H.* 21 *E.* 4. *dit que, tiel tenant per le cuſtome paiant ſes ſervices ſoit eject per ſe Seignior, que il avera action de trns. vers luy. Et iſſint Danby, M.* 7. *Ed.* 4. *dit, que le tenant per le cuſtome ē cibien inheriter daver ſon tēr ſolonque le cuſtome, come ceſty que ad franktenement al common ley.*

CHAP. X.

Tenant per le vergs.

Sect. 78.

CUſtome *que neſt pas* encounter reaſon *poit bien eſtr. admit ſeneſchallus* is derived of *Sein* an houſe or place, and *Schalc.* an Officer or Governour; ſome ſay that *Sen* is an ancient word for Juſtice, ſo as *Seneſchal* ſhould ſignify *Officiarius Juſtitiæ.* In this place it ſignifieth an Officer or Juſtice, *viz.* a Keeper of Courts, *&c. Fleta, lib.* 2. *ca.* 66. Deſcribeth his Office at large moſt excellently.

Provideat ſibi Dominus de Seneſchallo circumſpecto & fideli, viro provido & diſcreto & gratioſo, humili, pudico, pacifico, & modeſto, qui in legibus conſuetudinibuſque provinciæ & officio Seneſchalciæ ſe cognoſcat & jura domini ſui in omnibus teneri affectet, quiq; ſub ballivos domini in ſuis erroribus & ambiguis ſciat inſtru-

exe & docere, quæque egenis parcere, & qui nec prece vel pretio velit à tramite Justitiæ deviare, & perverse judicare, cujus officium est, Curias tenere Maneriorum & de subtractionibus consuetudinum, serviciorum, reddituum, sect' ad Cur. Mercata, Molendina domini & ad visus francpledg: aliarumq; libertatum domino pertinentium inquirat, &c.

Sect. 79.

Ballivus, Bailiff signifieth a safe Keeper or protector. *Præfectus* or *Præpositus*, *Reve*, signifieth a disposer or director. *Vide Fleta, lib.* 2. *cap.* 67. Where he treateth of the Office of the Bailiff. And *cap.* 69. Of the Office of the *Reve*, or *Reeve, &c.*

Ballivus autem cujuscunq; Manerii esse debet in verbo verax, & in opere diligens & fidelis, ac pro discreto appruatore cognitus plegiatus & clericus, qui de communioribus legibus pro tanto Officio sufficienter se cognoscat, & quod sit ita justus, quod ob vindictam seu cupiditatem non quærat versus tenentes domini nec alios, &c.

Præpositus autem tanquam appruator & cultor optimus, &c. Domino vel ejus Seneschallo palam debet presentari cui injungatur officium illud indilate, non ergo sit piger aut somnolentus sed efficaciter & continue commodum domini adipisci nitatur & exarare, &c.

Sect. 80, & 81.

Whatsoever is not against reason may well be admitted and allowed. This is not to be understood of every unlearned mans reason, but of artificial and legal reason warranted by authority of Law. *Lex est summa ratio*, Fo. 62. a.

Sect. 81, 82, 83, &c.

Tenant *per le* Custome, *&c. sont appelles tenants per base tenure, pur ceo que ils nont asc' franktenement per le course del common ley. Tiel tenant en asc' lieux doit repaire measons,*

ſons, &c. Auxi il ferra fealty. Mes Tenant a volunt per le Common ley, nemy; & ſi tiel tenant que eſt ejus per Leaſe al Common ley mor. & ſon heire enter, le leſſor avera action de trns. enis. luy; auterment eſt de tenant a volunt per le Cuſtome, *&c.* Vide *Diverſitat. &c.*

Conſuetudo Manerii eſt obſervanda. But if there be no Cuſtome to the contrary, waſte either *permiſſive* or voluntary of a Copiholder, is a forfeiture of his Copihold. The doing of fealty by a Copiholder, proveth that ſo long as he obſerves the cuſtome of the Manor, and payeth his ſervices; he hath a fixed eſtate. *Vide Cook. Report. lib.* 4. *fo.* 21, 22, 23, *&c.*

Finis Libri Primi.

Liber Secundus.

CHAP. I.

Homage.

Sect. 85.

HOmage *eſt le pluis* honourable ſervice, *& le pluis* humble ſervice *de* reverence, *que franktenant poit faire a Son Seignior.* 1. It is moſt honourable, &c. For, honour *plus eſt in honorante, quam in honorato.* 2. It is *pluis* humble *de* reverence, for the Tenant when he doth his Homage is, *diſcinctus nudo capite.* Ad pedes domini ſuper genua projectus. Ambas manus vinctas inter manus domini porrigit, & per verba omni ſupplici veneratione plena, *he ſaith,* jeo deveigne voſtre home, &c.

Debet quidem tenens * manus ſuas utraſque ponere inter manus utraſque domini ſui, per quod ſignificatur ex parte domini protectio, defenſio,& warrantia ; & ex parte tenentis reverentia & ſubjectio. *Fo.* 65. a.

Homagium ligeum, is due to the King onely.

The King is ſoveraigne Lord, or *Lord paramount*, either mediate or immediate of all and every parcell of land within

the Realm; for all the Lands, &c. were originally derived from the Crown. 18 *E.* 3. 35.

Item videndum eſt quis poteſt homagium facere. Sciendum eſt quod quilibet liber homo tam maſculus quam fœmina, Clericus & Laicus, Major & Minor, dum tamen electi in Epiſcopos, poſt conſecrationem hom. non faciant, quicquid fecerint ante, ſed tantum fidelitatem. Conventus autem hominum non faciet de jure ſicut nec Abbas, nec Prior, eo quod tenent nomine alieno ſc. nomine Eccleſiarum. Mirror *cap.* 1. S. 2. & *ca.* 2. *Sect.* 1. & 2. Fo. 65. *b.**

Nil ſine prudenti fecit ratione vetuſtas. *Fo.* 65. a.

Nunquam proſpere ſuccedunt res humanæ, ubi negliguntur divinæ. *Fol.* 64. b.

Sex horas ſomno, totidem des legibus æquis.
Quatuor orabis, des Epuliſque duas.
Quod ſupereſt ultro ſacris largire camenis.

Sect. 86, and 87.

Nota, in old Books and Records, the Homage which a Biſhop, Abbat or other man of Religion doth, is called fealty, for that it wanteth theſe words (*Jeo deveign voſtre home*.) But yet in judgment of Law it is Homage, becauſe, he ſaith, I do to you homage, &c. and ſo of a Woman.

Argumentum ab inconvenienti plurimum valet in lege.

Non ſolum quod licet, ſed quid eſt conveniens eſt conſiderandum, nihil quod eſt inconveniens ē licitum.

Sect. 89, and 90.

Nul fer. homage, mes tiel que ad eſtate in fee ſimple ou en fee taile, en ſon drt. dem. ou en droit dun auter.

Si un home ad ſeverall tenancies queux il tient de ſeverall ſeignieurs, per homage, donques quant il ft. homage a un des ſeignieurs, il dirra en le fine de ſon homage fait, ſalve la foy que iai doy a nature ſeignieur le Roy & a mes auters ſeignieurs.

Non Corporation aggregate of many perſons capable, ſhall do homage; becauſe that homage muſt be done in perſon, and a Corporation, &c. cannot appear in perſon. But an Abbat

Abbat in nature of a ſole Corporation ſhall do homage; becauſe the Covent are all dead perſons in law. *Vide, &c. fo. 66. b.* lib. 4. 11. l. 7. 10.*

Contra negantem principia non eſt diſputandum.

A Parſon or Vicar of a Church that hath a qualified fee, and yet to many intents upon the matter but an eſtate for life, can neither receive homage nor do homage, as a Biſhop, &c. that a fee abſolute may.

Tenant per le Curteſie, &c. ne ferre homage, &c. per ceo que il adonq; nad eſtate forſq; per terme de vie. *Et Nota.*

He that cannot receive homage in reſpect of the weakneſs of his eſtate in the Seigniory, ſhall not do homage if he hath a like eſtate in the tenancy, *fo. 67. a. vide lib.* &c.

Primogenita filia tantum faciet homagium Domino pro ſe & omnibus ſororibus ſuis. Quia omnes ſorores ſunt quaſi unus hæres de una hæreditate, 14 *H. 3. tit. Prærog. 5.*

Every tenant in common ſhall do ſeveral ſervices.

If homage be parcel of a Tenure, it is a preſumption that the Tenure is by Knights ſervice, unleſs the contrary be proved.

CHAP. II.

Fealty.

Sect. 91, 92, 93, and 94.

TEnant for years ſhall do Fealty, *Littl. fo. 29. nu. 132.*

Sciendum eſt quod non per procuratores nec per literas fieri poterit homagium, ſed in propria perſona tam domini quam tenentis, capi debet & fieri. *Bract. lib. 2. fo. 8.*

Mes le Seneſchal del Court le Signieur ou Bayliſe poit purender fealtie pur le Seignieur. Item tenant a terme de vie ferre fealty & encore il ne ferre homage. *Sic vide diverſitatem.*

The tenant must do fealty in person, because he must be sworn unto it, and no man can swear by the Common Law by Attorney or Proctor, *fo.* 68. 8.

Whosoever is above the age of 12 years, is to take the Oath of Allegiance, and he is to be sworn in the Tourne, unless he be within some Leet, and then in the Leet.

CHAP. III.

Escuage.

Sect. 94.

SCutagium (id est) servitium scuti.
Nomina si nescis perit cognitio rerum.

Bracton saith, Item scutagium dicitur quòd talis præstatio pertinet ad scutum quòd assumitur & servitium militare *fol.* 68. *b.*

Every Tenure by Escuage is a Tenure by Knights service *Sed non è converso.* But note here the wisdom of Antiquity *Mavult enim princeps domesticos quam stipendiarios bellicis appo nere casibus*, lib. rub.

Quant le Roy fait royall voiage en escoce, &c. donque q que tient per un fee de Chivaler, &c. covient erre oue le Roy per 40. jours, bien & convenablement array pur le guerre & sic de cæteris, &c.

In the ancient Treatise, *De modo tenendi Parliamentum tempore Regis* Edw. *filii Regis* Etheldredi, it appeareth, That *Comitatus* (to wit) an Earldom *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas. Baronia constat ex* 13. *feodis, & 3. parte unius feodi militis secundum comput' prædictam; unum feodum militis constat ex terris ad valentiam*, 20. *l. fol.* 79. *a.*

A Marquisdom consists of the Revenue of two Baronies which amount to 800 Marks. And a Dukedom consists of the

the Revenues of two Earldoms, *viz.* 800 pounds *per annum*, *fol.* 79. *b.*

Note, That the relief of a Knight, and all above him which be Noble, is the fourth part of their yearly revenue, as of a Knight 5 l, which is the fourth part of 20 l. &c.

Edward the eldeſt Son of King *Edw.* 3. called *The Black Prince*, was the firſt Duke in *England* after the Conqueſt; and *Robert Vere* Earl of *Oxford* in the reign of *R.* 2. was the firſt Marquis. *Et Dominus de Bellomonte* was the firſt Viſcount created by King *H.* 6.

A voyage Royal is not only when the King himſelf goeth to War, as *Littleton* here ſaith, but alſo when his Lieutenant, or Deputy of his Lieutenant goeth.

He that holdeth by Caſtle gard or Cornage, holdeth by Knights ſervice, and yet he ſhall pay no Eſcuage, becauſe he holdeth not to go with the King to War.

Sir *Richard Rocgeſly* Knight, did hold Lands at *Seaton* by Sergeantry, to be *vantrarius Regis*, the Kings fore Footman when the King went to *Gaſcoigne*, *donec per uſus fuit pari ſolutarum precii* 4 d. that is, until he had worn out a pair of ſhoes of the price of four pence.

And this ſervice being permitted to be performed when the King went to *Gaſcoigne* to make war, is Knights ſervice. See an ancient Record, *Rot. de finibus Termino Mich.* 11. *Edw.* 2.

If the tenant *peravaile* goeth with the King, it excuſeth all the means, &c. For one tenancy ſhall pay but one Eſcuage, *F. N. B.* 83, 84.

Sect. 96.

Albeit the Tenure is, That he which holdeth by a whole Knights fee ought to be with the King, &c. to do a corporal ſervice, yet he may find another able man to do it for him. But it may be objected; That in ſome particular caſes the tenant might find a man, but not when he himſelf is able without all excuſe or impediment. To this it is anſwered, That *ſapiens incipit à fine.* And the end of this ſervice

vice is for the defence of the Realm, and so it be done by an able and sufficient man, the end is effected.

2. Seeing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable, *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.*

3. Both *Littleton* and the book in 7 *Ed.* 3. giveth the tenant power, without any excuse to be shewed, to find an able and sufficient man, and oftentimes *Jura publica ex privato promiscue decidi non debent.*

Præposstera lectio, & præpropera praxis, are enemies to learning, *fol.* 70. *b.*

Cessante ratione legis, cessat ipsa lex. If Mayor and Commonalty convey over their Lands holden by Knights service to any natural man and his heirs, now Homage-ward &c. belong to the Tenure, &c.

Note, That every Bishop in *England* hath a Barony, and that Barony is holden of the King *in Capite*, and yet the King can neither have Wardship or relief.

Nemo militans Deo implicetur secularibus negotiis.

Ferdwit in Saxon' significat quietanciam murdri in exercitu. *Worscot* signifieth, Liberum esse de oneribus armorum. *fo.* 71. *a. Fleta lib.* 1. *cap.* 42.

Miles hæc tria curare debeat, corpus ut validissimum & pernicioſissimum habeat, arma apta ad subita imperia, cæteri Deo & Imperatori curæ esse. *Livius.*

Sapiens non semper ita uno gradu, sed una via, non se mutat sed aptat. Qui secundos optat eventus, dimicet arte non casu. In omni conflictu non tam prodest multitudo quam virtus. *Vegetius.*

Est optimi ducis scire & vincere, & cedere prudenter tempori. Multum potest in rebus humanis occasio, plurimum in bellicis. *Polybius.*

Quid tam necessarium est quam tenere semper arma quibus rectus esse possis. *Vegetius.*

Concerning the point in Law demurred in judgment in the

the 7 *Ed.* 3. here mentioned by *Littleton.* The Law accounteth the beginning of the 40 daies after the King entreth into the Foreign Nation, for then the War beginneth, *&c. Vide*, &c.

The knowledge of the Law is like a deep Well, out of which each man draweth according to the ſtrength of his own underſtanding. And as the Bucket in the depth is eaſily drawn to the uppermoſt part of the water (for *nullum elementum in ſuo proprio loco eſt grave*) but take it from the water, it cannot be drawn up but with great difficulty; for albeit the beginnings of this ſtudy ſeem difficult, yet when the Profeſſour of the Law can dive into the depth, it is delightfull, eaſie, and without any heavy burthen, ſo long as he keep himſelf in his own proper element. *Juſticiarii de banco*, &c. *Communia placita non ſequantur Cur' noſtram ſed teneantur in aliquo certo loco.* Mag. Charta.

He which demurreth in law, *Moratur*, or *Demoratur in lege.* Matters in Law are decided by the Judges, and matters in fact by Juries. Now as there is no iſſue upon the fact, but when it is joined between the parties; ſo there is no Demurre in law, but when it is joyned, &c. *Vide & quære, fol.* 71. *b.*

In ſome caſes a man ſhall alledge ſpecial matter, and conclude with a Demurre; as in an action of Treſpaſs brought by *I. S.* for the taking of his Horſe, the defendant pleads that he himſelf was poſſeſſed of the Horſe, untill he was by one *I. S.* diſpoſſeſſed, who gave him to the Plaintiff, *&c.* the Plaintiff ſaith, that *I. S.* named in the Bar, and *I. S.* the Plaintiff, were all one perſon, and not diverſe; and to the Plea pleaded by the Defendant in the manner, he demurres in law, and the Court did hold the Plea and Demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurre upon Counts and Pleas, ſo there may be of Aid, Prior, Voucher, Reſceit, Waging of Law, *&c.* There is a general Demurre, that is, ſhewing no cauſe; and a ſpecial Demurre, which ſheweth the cauſe of his Demurrer. Alſo there is a Demurr upon

pleading,

pleading, &c. and there is also a Demurre upon Evidence. *Vide Lib. fol. 72. a.*

Sect. 97, 98 and 99.

No escuage was assessed by Parliament since the eighth year of the reign of *Edw.* 2. *fol.* 72. *b.*

Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo scutagii facit socagium.

Si home parle generalement descuage, il ser. entend' &c. descuage noncertaine que est service de Chivaler, & tiel escuage trait, a luy homage, & fealty, car fealty est incident a chesc' maner de service forsq; a le tenant in Frankalmoigne. Verba æquivoca & in dubio posita intelliguntur in dignior & potentiori sensu.

Tenure *in capite ex vi termini*, is a Tenure in Gross, and it may be holden of a subject, but being spoken generally it is *secundum excellentiam*, intended of the King, for he is *caput reipublicæ*, *fol.* 73. *a.* Escuage can be assessed only by Parliament, and not by the King.

Sect. 101.

Les seignieurs poient distrein per Escuage assess. per Parlament, ou ils en asc' cases purront au. breve le roy direct' a viconts de in les counties, &c. de levier tiel Escuage per eux. *Vide de Regist.*

Writs are the foundations whereupon the whole Law doth depend. *Fitzherbert* in his Preface to his *Nat. Br.*

Breve sicut regula juris rem quæ est breviter enarrat, non tamen ita breve esse debeat quin rationem & vim intentionis contineat. *Bract. lib.* 5. *fo.* 413, &c.

Of Writs some be Original, and some be Judicial.

Also of Originals, Quædam sunt formata sub suis casibus & de cursu, & de communi consilio totius regni concessa & approbata, quæ quidem nullatenus mutari poterint absq; consensu & voluntate eorum; & quædam sunt Magistralia & sæpe variantur secundum varietatem casuum, factorum & quærelarium. As Actions upon the Case, which vary, &c.

Item

tem brevium originalium, alia ſunt realia, alia perſonalia, alia mixta. Item, &c. alia ſunt patentia ſive aperta, & alia clauſa.

Certain it is that the Original Writs are ſo artificially and briefly compiled, as there is nothing redundant or wanting in them; of which one ſaid, That it was impoſſible to comprehend ſo much matter, ſo perſpicuouſly, in fewer words.

Brevia judicialia ſæpius variantur ſecundum varietatem placitorum proponentis & reſpondentis.

Sect. 102.

Mareſchallus exercitus, in Saxon *Mariſchalk*, i. e. equitum Magiſter. *Marſhal* is either derived of *Mars*, or of *Marc* an horſe, which ſignifieth in the Saxon tongue a Maſter or Governour.

I read of ſix kinds of Certificates allowed for Tryals by the Common Law: The firſt whereof *Littleton* ſpeaketh, in time of War out of the Realm by the Marſhal, &c. 2. In time of Peace out of the Realm. As if it be alledged in avoidance of an Outlawry, That the Defendant was in Priſon at *Bourdeaux*, &c. it ſhall be tryed by the Certificate of the Mayor, &c. 2 *E.* 4. 1. *b.* 4 *E.* 4. 10. 3. For matters within the Realm, 5 *E.* 4. 30. the Cuſtome of *London* ſhall be certified by the Mayor and Aldermen by the mouth of the Recorder. 4. By Certificate of the Sheriff upon a Writ to him directed, 10 *H.* 10. in caſe of Privilege, if one be a Citizen or a Foreigner. 5. Tryal of Records by Certificate of the Judges in whoſe cuſtody they are by Law. All theſe be in Temporal cauſes. 6. In cauſes Eccleſiaſtical, as loyalty in Marriage, general Baſtardy, Excommengement, Profeſſion, *&c.* which are to be tried by the Certificate of the Ordinary.

Alſo if a Subject of the King be killed by another of his Subjects out of *England*, in any Foreign Country, the wife, or he that is heir of the dead, may have an Appeal for this Murther or Homicide before the Conſtable and the Marſhal, whoſe

whoſe ſentence is upon the Teſtimony of Witneſſes or Co
bate, *fo.* 74. *a. vide lib. Stat.* 1 *H.* 4. *ca.* 14. 13 *H.* 4. *fol.*
&c. *Anno* 25 *El.* &c.

CHAP. IV.

Knights ſervice.

Sect. 103.

TEnure per homage, fealty & eſcuage eſt a tener p
ſervice de Chivaler, & trait a luy gard, mariage
reliefe.

Si hæreditas teneatur per ſervitium militare, tunc p
leges infans ipſe, & hæreditas ejus, *&c.* per dominum feo
illius cuſtodientur, *&c. Forteſcu. ca.* 44.

Audacter quilibet facit quod ſe ſcire non diffidit.

Amongſt the Laws of St. *Edward* the Confeſſor, it is th
provided; Debent enim univerſi liberi homines, *&c*, ſecu
dum fœdum ſuum, & ſciendum tenementa ſua arma habe
& illa ſemper prompta conſervare ad tuitionem regni, & ſe
vitium dominorum ſuorum juxta præceptum domini Reg
explendum & peragendum, *Lambert fo.* 135. a.

And *William* the Conqueror confirmed that Law, *&c.*

And therefore if after the Lord hath the Wardſhip of th
body and land, the Lord doth releaſe to the Infant his righ
in the Seigniory, or the Seigniory deſcendeth to the Infan
he ſhall be out of Ward, *&c.* for he was in Ward in reſpe
he was not able to do thoſe ſervices which he ought to do t
his Lord, which now are extinct, *& ceſſante cauſa, ceſſat ea
ſatum*, fol. 76. *a.*

Regularly there be ſix incidents to Knights ſervice, *viz*
Two of Honour and Submiſſion, as Homage and Fealty, and
four of Profit, as Eſcuage, Ward, Marriage and Relief.

Alſo there be other incidents to Knights ſervice beſide
theſe

eſe; as *aid per faire fitz Chivaler*, and *aid per file marier*, &c.

Relevium is derived from Relevare; Quia hæreditas quæ cens fuit per anteceſſoris deceſſum, relevatur in manus hædum, & propter factam relevationem facienda erit ab hæde quædam præſtatio quæ dicitur relevium. *Bract. lib. 2. ca. 6. fo.* 84. By cuſtome the heirs of him that holdeth in Soage may be in ward. * By the common Law, the heir ſhall not be in ward, unleſs he claim as heir by deſcent. *Vide Libr.*

In many Caſes the heir ſhall be in ward, albeit the Tenant died not ſeiſed, *&c.* nor in the Homage of the Lord.

But if one levy a fine executory (as *ſur* grant and render) o a man and his heirs, and he to whom the Land is granted nd rendred, before execution dieth, his heir being within ge entreth, he ſhall not be in ward, for his anceſtor was neer * tenant to the Lord. *Vide*, &c.

If the diſſeiſie die, his heir being within age, the Lord ſhall have the wardſhip of the heir of the body of the diſſeiſee; and if the diſſeiſor dieth ſeiſed and his heir within age, the Lord may ſeiſe the wardſhip of his heir alſo, and of the Land alſo, &c. *Vide*, &c.

For the eaſe of the heir, and for avoiding of danger, *&c.* The heir for the moſt part (after his full age) ſueth out a ſpecial livery, which containeth a beneficial pardon, *&c. Fo.* 77. *a. Vide* & quære.

A common perſon ſhall have nothing in ward but that which is holden of him. But the King by his Prerogative ſhall not onely have ſuch lands, *&c.* which the heir of his Tenant by Knights ſervice in *Capite* holdeth of others, but ſuch inheritances alſo as are not holden at all of any, as rentcharges, rent-ſeck, Fairs, Markets, Warrens, Annuities, &c. *Fo.* 78. *a.* Stamf. pr. *Fo.* 8.*

The Law is changed, ſince *Littleton* wrote in many Caſes, both for the marriage of the body, and for the wardſhip of the Lands, and a far greater benefit given to the Lords, than the common Law gave them, and ſome advantage given to the heirs, which before they had not.

As

As if the Father had made an eſtate for life or a gift in tail of Lands holden by Knights ſervice to his eldeſt Son or other heir apparent within age, the remainder in Fee to any other, and dyed, the heir ſhould not have been in ward for this was out of the Stat. *Marlebridge:* But at this day the heir ſhall be in that caſe in ward for his body and a third part of his land. So if the Father had infeoffed his eldeſt Son within age and a ſtranger, and the heirs of the ſon, and died the ſon ſhould have been out of ward; but at this day he ſhall be in ward for his body, and for a third part of his moi-ty. *Fo.* 78. a. *Vide*, &c.

The benefits that grew to the ſubject by acts of Parliament were, that tenants in Fee ſimple, might deviſe their lands in ſuch manner and form, *&c.* Alſo that the Father might infeoffe his eldeſt Son or other heir lineal or collateral holden by Knights ſervice, and two parts of the Land ſhall be out of ward. *Lib.* 8. *fo.* 83. & *fo.* 163.

And both the Statute of 32 and 34 *H.* 8. Concerning Wills and Wardſhips are many waies prejudicial to the heirs: as, if Tenant by Knights ſervice make a Feoffment in Fee to the uſe of his wife and her heirs, or to the uſe of a younger Son and his heirs, or wholly for the payment of his debts. In theſe caſes, although nothing at all of the Lands ſo holden deſcend to the heir, but he is diſherited of the ſame, yet his body ſhall be in ward.

In facto quod ſe habet ad bonum & malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta ſcire. Nulla impoſſibilia aut inhoneſta ſunt preſumenda, vera tamen & honeſta, & poſſibilia. Lex ſemper intendit quod rationi convenit. By intendment of Law the heir is not able to do Knights ſervice before his full age of 21 years, and therefore hath a guardian, *&c.*

A woman hath ſeven ages for ſeveral purpoſes appointed to her by Law: as, ſeven years for the Lord to have aid *pur file Marr.* Nine years to deſerve Dower, 12 years to conſent to marriage, untill 14 years to be in ward, 14 years to be out of ward, if ſhe attained thereunto in the life of

her

ancestor; 16 years for to tender her marriage if she der the age of 14 at the death of her Ancestor, and 21 rs to alienate her Lands, goods and Chattels. *Fo.* 78. *b.* *H.* 6. 40. *Bract. l.* 2. *c.* 37.

A man also by the Law for several purposes hath divers s assigned unto him, *viz.* 12 years to take the oath of legiance in the Torn or Leet, 14 years to consent to rriage, 14 years for the heir in socage to chuse his guarn, and 14 years is also accounted his age of discretion, years for the Lord to have *aid pur faire fitz Chivaler*: unr 21 to be in ward to the Lord by Knights service: under to be in ward to guardian in socage: 14 to be out of ard of Guardian in Socage, and 21 to be out of ward of uardian in Chivalrie, and to alien his Lands, Goods, and hattels. 34. *E.* 1. St. 3. *F. N. B.* 202.

But put case the Lord cannot have the wardship of the and, as if the Lord before the age of 14 grant over the ardship of the body, the grantee cannot have the two years ecause he cannot hold over the Land, and the Lord which ath the wardship of the land only should lose the benefit of e two years, because he hath the lands only, and cannot ender any marriage, therefore in this case the heir female hall enter into her land at her age of 14 years.

Cessante causa cessat effectus; & cessante ratione legis cessat beneficium legis. Vide, &c.

If the Lord tender a convenable marriage to the heir within the two years, and she marry elsewhere within those two years, the Lord shall not have the forfeiture of the marriage, for the Statute giveth the two years only to make a tender: *Lib.* 6. *fo.* 71. Lord *Darcies* Case. And if after such tender, &c. the heir female refuseth, then the Lord shall hold the Land untill her age of 21 years, and further untill he hath levied the value of her marriage. Statute of *West.* 1. 31. *Ass. p.* 26.

The tender of a marriage to an heir female before the age of 14 is void (*i. e.*) where the Lord may hold the Land for the said two years, for then the Statute appointeth the time

time of tender; but where the Lord cannot have the years he may tender, &c. At any time after the age of and before 14. for ſo he might have done at the comm Law. *L.* 6. 71. *Darcy. Le Seignor. naüa les* 2. *ans apres les ans, mes lou l' heire female eſt dens l' age de* 14. *ans nient ma al temps de Mort ſon Anceſtor.*

Sect. 104, and 105.

The time of agreement or diſagreement, when they m ry *infra annos nubiles*, is for the woman at 12, or after, and the man at 14 or after, and there need no new marriage they ſo agree, but diſagree they cannot before, *&c.* But man of the age of 14 marry a woman of the age of 10, at age of 12 he may as well diſagree, as ſhe may, though were of the age of conſent; becauſe in contracts of Mar mony either both muſt be bound, or equal election of di greement given to both, and ſo *è converſo*, if the woman be the age of conſent, and the man under.

Dominus non maritabit minorem in cuſtodia ſua niſi mel. *Fo.* 79. *b. Vide*, &c.

Sect. 107, and 108.

Per le ſtat. de *Merton. ca.* 6. nul diſparagement eſt, mes celuy que eſt en gard ë marie deins lage de 14. ans.

There be four kinds of diſparagements. 1. *propter vitium animi.* 2. *Sanguinis.* 3. *Corporis.* 4. *propter jacturam privilegii. Vide Libr.*

Of diſparagements at large, *Vide Libr.* in *Fo.* 80. &c.

Magna Charta, is, *Charta libertatum*; *magnum in parvo. Et magna fuit quondam magnæ reverentia Chartæ. Periculoſum exiſtimo quod bonorum virorum. non comprobatur exemplo.* Uſage is a good interpreter of Laws, *& non uſage* is an intendment that the Law will not bear it.

Sect. 110, and 111.

It is in the election of the Lord, whether for the ſingle value the Lord will tender a marriage or no; for he ſhall have

ſingle value without any tender. *Lib. 6. fo.* 70. L. *Darcies* ſe.

If the heir male before any tender, marrieth himſelf with- age, he ſhall pay but the ſingle value of the marriage 82. *b. Vide Libr.*

He that holdeth by Caſtlegard, holdeth by Knights ſervice. not by Eſcuage; for Eſcuage is due when the King ma- h a voyage royal out of this Realm, and the Tenant ma- h default, but Caſtlegard is to be done within the Realm, *l.* 4. *Luttrels* Caſe, and *l. 6. Gregories* Caſe.

Relief is no ſervice, but an improvement of the ſervice, an incident to the ſervice, for which the Lord may ſtrein, but cannot have an action of debt; but his execu- rs or Adminiſtrators may have an action of debt, and can- t diſtrein.

A Knights Fee conſiſteth of 20 *l* land, and he payeth for s relief for a whole Knights Fee, the fourth part of his Fee, . Five pound, and ſo according to the rate. In ſome caſe e heir ſhall pay relief, when he was within age, at the me of the death of his Anceſtor. The Lord upon every eſcent ought to have either wardſhip or relief. *Fo.* 83. b. *ide*, &c.

And in ſome caſe one Lord of the heir of one Tenant all have both wardſhip during his Minority, and relief at is full age. *Vide, lib.* &c.

Sect. 114.

Nul ſer. ingard de ſon corps a aſcum Seignior. vivant ſon pier, &c. 84. *a.*

Where the Lord hath a double intereſt in the wardſhip f the body, one as Lord, and another as Father; in that caſe he wardſhip by reaſon of nature cannot be waved, and laim made in reſpect of the Seigniory. *Vide lib.* &c. 35. *H.* 55. *l.* 7. *fo.* 13. *Calvins* Caſe.

Sect. 115, and 116.

L' eſtatute de ann. 4. H. 7. ca. 17. *done le* Gardianſhip *del ſe; ſicome del ſeiſin in demeſne.*

Gar-

Gardian en droit en chivalry eſt lou le Seignior. ẽ. feife gard de terre & de ! heire per cauſe de lon Seigniory. Mes ſi il grant le gard, *&c.* le grantee eſt appell gardian en *Fol.* 85. a. *Bra. grant.* 85 *Dyer* 371. 381.

If a man make a Leaſe for years of a villeine, this can be done without Deed, neither can the Leſſee aſſign it o without Deed; becauſe it is derived out of a Freehold lieth in grant: but the wardſhip of the body is an orig Chattell, during the Minority derived out of no Freeh and therefore as the Law createth it without Deed, ſo it be aſſigned over without Deed, the wardſhip of an Adv ſon cannot be granted without Deed. *Cauſa qua ſupra.* *Diverſ.*

CHAP. V.

Socage.

Sect. 117.

OMnium rerum ex quibus aliquid exquiritur nihil a cultura melius, nihil uberius, nihil dulcius, nihil li ro homine dignius. *Cicero lib.* 1. *offic.*

Virg. O Fortunatos nimium, ſua ſi bona norunt
Lib. 1. Agricolas, quibus ipſa procul diſcordibus armi
Georg. Fundit humo facilem victum juſtiſſima tellus.

Nullum laborem recuſant manus quæ ab aratro ad a transferuntur, *&c.* Fortior autem Miles ex confragoſo ve ſed ille unctus, & nitidus in primo pulvere deficit. *Seneca Epiſt.*

In the Book of *Domeſday*, Land holden by Knights ſer was called *Taniland*, and Land holden by Socage, was ca *Reveland.* Fo. 86. a.

Note, that the legal ſignification of *(agium)* in compoſ on termineth ſervice or duty, as *Homagium*, the ſervice

e man, &c. *Vide Libr.* a woundy miſtake (*ſignum pro termino.*)

Ex donationibus autem feoda militaria, vel magnam ſervantiam non continentibus oritur nobis quoddam nomen generale, quod eſt ſocagium.

It is a preſumption where homage is due, that the lands holden by Knights ſervice.

Sect. 118. and 119.

Home poit tener per fealty tantum, & eſt a tener en Socage car cheſcun tenure, que neſt pas in Chivalry eſt tenure en Socage. Here *Littleton* ſpeaketh of Tenures of common perſons, for grand Serjeanty is not Knights ſervice, and yet is not a Tenure in Socage, *Vide, &c.* And note, That ſome Tenures in Socage are named *à cauſa*, and ſome and the greater part *ab effectu.*

Socagium idem eſt quod ſervitium Socæ, & Soca idem eſt, quod caruca. ſ. un ſoke, ou un carve.

As *carucata terræ*, a plough land may contain houſes, mils, paſture, meadow, wood, *&c.* as pertaining to the plough, ſo under the ſervice of the Plough, all ſervices of tillage or husbandry are included.

Although the cauſe whereupon the name of Socage firſt grew be taken away, yet the name remains the ſame it hath been, and is uſed to diſtinguiſh this Tenure, from a Tenure by Knights ſervice.

Nomina ſi perdas certè diſtinctio rerum perditur.

Sect. 120, and 121.

Eſcuage certain, is not *in rei veritate ſervit' ſcuti*, which is to be done by the body of a man; but it is *ſervitium Crumenæ*, of money, which is to be drawn out of the purſe, and that is in effect a Tenure in Socage.

If a rent be paid for Caſtlegard, it is clear a Socage Tenure; but if a ſum in groſs or other thing be voluntarily paid or given by the tenant, and voluntarily received by the Lord in lieu of Caſtlegard, yet the Tenure by Knights ſervice

ſervice remaineth, *vide lib.* 4. *fo.* 88. in *Lutterels* Caſe.

Rent ſervice is accompanied with ſome corporal ſervi as fealty at the leaſt, *Sect.* 122.

Sect. 123.

If lands holden in Soccage be given to a man, and t heirs of his body, and he dieth, his heir within age, the ne Couſin of the part of the father, albeit he be worthier, ſh not be preferred before the next Couſin of the part of t mother; but ſuch of them as firſt ſeiſeth the heir ſhall ha his Cuſtody, *fo.* 88. *a.*

If *A.* be Guardian in Soccage of the body and lands *B.* within age of 14 years. *A.* ſhall be Guardian *per cauſe gard.* But an Infant, *&c.* that is not in the cuſtody of an ther, cannot be *Guardian en Soccage*, becauſe no Writ of A count lieth againſt an Infant.

Alium regere non poteſt, qui ſeipſum regere non novit. Brac lib. 2. fo. 88.

Minor minorem cuſtodire non debet, alios enim preſum tur male regere, qui ſeipſum regere neſcit, Fleta lib. cap. 10.

Hæres ſokmanii ſub cuſtodia capitalium dominorum non er ſed ſub cuſtod' conſanguineorum ſuorum propinquorum, hoc eſt, rum qui conjuncti ſunt jure ſanguinis, & non jure ſucceſſioni ex parte quor' non deſcendit hæreditas, &c.

Hereby not only an immediate deſcent, but all poſſibili of deſcent is excluded. *Vide lib. fo.* 88. b.

The father Guardian in Soccage muſt by law be accoun able to the ſon, both for his marriage, and alſo for the pro fits of his lands, which he ſhould not if he had the cuſtod *&c.* in this caſe as father in reſpect of nature.

And the act of the law never doth any man wrong *ſic vid diverſitatem*, &c.

Guardian in Soccage ſhall not forfeit his intereſt by ou lawry or attainder of Felony or Treaſon, becauſe he ha nothing to his own uſe, but to the uſe of the heir.

Legitim

Legitima ætas, as the Statute of *Merlebridge*, 52 *H.* 3. ſpeaketh; or *plena ætas*, as the Writ of Account doth render it, are to be underſtood *ſecundum ſubjectam materiam*, that is of the heir of Soccage land, whoſe lawfull and full age as to Guardianſhip is fourteen years.

And as to the recital of the Statute, it is evident, That an action of Account did lie againſt Guardian in Soccage at the Commonlaw, *Vide libr. fo.* 89. *a.**

If the Guardian receive the rents and profits, *&c.* and he be robbed without his default or negligence, he ſhall be diſcharged thereof. But otherwiſe it is of a Carrier, for he hath his hire, and thereby implicitely undertaketh the ſafe delivery of the goods delivered to him. *H.* 38. *Eliz. inter Woodlief & Curteis.*

Note, it is neceſſary for any that receiveth goods to be kept, to receive in this ſpecial manner, *viz.* To be kept as his own, or to keep them at the peril of the owner. To be kept, and to be ſafely kept, is all one in Law, *ſic vide diverſit. Paſcha*, 43 *Eliz. Southcote* and *Bennet.*

The *Guardian en Soccage* ſhall account for the marriage of the heir: ſo for ſo much as any man *bona fide* had offered for the marriage unto him.

Le enfant al age de 18 years *poit faire ſon teſtament, &c.*

Nota, Executors could not have an action of Account at the Commonlaw, in reſpect of the privity of the Account; but the Statute of *Weſtm.* 2. *cap.* 23. hath given the Action of Account to Executors, the Statute of 25 *Ed.* 3. *cap.* 5. to Executors of Executors, the Statute of 31 *Ed.* 3. *cap.* 11. to Adminiſtrators.

The *Guardian en Socage* is bounden by Law, That the heir be well brought up, and that his Evidences be ſafely kept.

Sect. 124. and 125.

Sed quære ſi apres lage de 14 *ans, &c.* This quære came not out of *Littletons* quiver; for it is evident, That after the age of 14 years, *Gardian en Socage* ſhall be charged Bayliff at

any time when the heir will, either before his age of 21 years, or after.

Gardian en Chivalry ad le gard a ſon proper uſe, & Gardian en Soccage, nad le gard a ſon uſe, mes al uſe del heir.

Et ſi Gardian en Soccage devie devant aſc' account fait per luy al heir, de ceo le heire en ſans remedy, per ceo que nul bre. de accompt gift tenus les execut' ſinon pur le roy tautſolement.

For albeit in an action of account againſt a Gardian in ſoccage, *&c.* the defendant cannot wage his Law, yet in reſpect of the privity of the matters of account, and the diſcharge reſting in the knowledge of the parties thereunto, an action of account lieth not, *&c.* but that is holpen by Statute. *Vide, &c. fo.* 90. b. *Rot. Parl.* 50. *E.* 3. *nu.* 123.

The King's Treaſure is *Firmamentum belli, & Ornamentum pacis. Nullum tempus occurrit Regi.*

Prerogative extends to all Powers, Preheminences and Privileges which the Law giveth to the Crown. *Stan. Prær.* 5. 10.

Sect. 126, & 127, 128, 129.

Le ſnr. auna del heire ſon tenant pur relief, tant come le rent amount que il paya per an, ouſter le rent, *&c.*

Of corporal ſervice, or labour or work of the tenant no relief is due, but where the tenant holdeth by ſuch yearly rents or profits which may be paid or delivered.

Et le ſnr. poit incontinent diſtreine per reliefe; ſinon que il ſoit tiel ſervice, que neſt donques an eſſe, ſicome le tenant tient per un proſe, & devie en yuer, *&c.*

For Flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing; (otherwiſe it is of Corn, *&c.*)

Lex ſpectat naturæ ordinem, non cogit ad impoſſibilia.

Impoſſibile eſt quod naturæ rei repugnat.

Sect. 130, & 131, 132.

Il eſt reaſon que le ſnr. & ſes heires ont aſc' ſervice fait a

cux

eux per proû & teſtifier que la terre eſt tenus de eux, *fol.* 92. b.

An Eſcheat is a caſual profit, *quod accidit domino ex eventu, & ex inſperato.*

Of incidents there be two ſorts, ſ. { Separable, as rents incident to Reverſions, *&c.* / Inſeparable, as Fealty to a Reverſion or Tenure.

Where the Tenure is by Fealty onely, there is no relief due, *fol.* 93. a. *Vide Lib.*

Leſſee per ans ferra fealty al leſſor, per ceo que il tiel de luy autrement eſt de tenant a volunt; car il nad aſc' ſure Eſtate.

And becauſe the manner of an oath muſt be certain, therefore tenant at will ſhall not do fealty.

CHAP. VI.

Frankalmoigne.

Sect. 133.

OF Eccleſiaſtical perſons ſome be { Regular, and they live under certain Rules, and have vowed three things; True Obedience, perpetual Chaſtity, and Wilfull Poverty. / Secular, as Biſhops, Deans and Chapters, Archdeacons, Prebends, Parſons, Vicars, *&c.*

All Eccleſiaſtical perſons may hold in Frankalmoigne be they Secular or Regular; but no Lay perſon, *&c.*

By the ancient Commonlaw of *England*, a man could not alien ſuch lands as he had by deſcent, without the conſent of his heir; yet he might give a part to God in Free-almoigne, or with his daughter in Free Marriage, or to his

ſervant *in remuneratione ſervitii, fol.* 94 b. *Glanville l.* 7. *cap.* 1. *fo.* 44, 45. *acc.*

Lands muſt be given to a Corporation aggregate of many by deed, and they have a Fee ſimple without theſe words (*Succeſſors*) for the body never dies.

Otherwiſe is it of a ſole Corporation. But yet out of the general rules the caſe of Frankalmoigne is excepted. And there is a diverſity, when the head and body both are capable, as Dean and Chapter; and when one, as in caſe of Abbot or Prior and Covent.

Ancient grants ſhall be allowed, as the Law was taken when ſuch Grants were made.

Sect. 134.

Decanus is derived of Δεκα, which ſignifieth Ten, for that he is an Eccleſiaſtical ſecular Governour, and was anciently over ten Prebends or Canons at the leaſt in a Cathedral Church, and is head of the Chapter. *Capitulum eſt Clericorum congregatio ſub uno Decano in Eccleſia Cathedrali.* And Chapters be twofold, *viz.* the ancient, and the later. The ancient Deans come in, in much like ſort as Biſhops do; for they are choſen by the Chapter, by a *Conge de eſlier*, as Biſhops be, as the King giving his Royal aſſent, they are confirmed by the Biſhop; but they which are either newly tranſlated, or founded, are Donative, and by the King's Letters Patents are inſtalled, *fo.* 95. *a.*

Eccleſiaſtical perſons have not capacity to take in Succeſſion, unleſs they be bodies Politique, as Biſhops, Archdeacons, Deans, Parſons, Vicars, *&c.* or lawfully incorporate by the Kings Letters Patents, or Preſcription.

Sect. 135.

Of Tenures ſome be Spiritual, and ſome be Temporal; and of Spiritual, ſome be incertain, as Tenures in Frankalmoigne, and ſome be certain, as Tenures by Divine ſervice. Again, Divine ſervice is twofold, either Spiritual, as Prayers to God; or Temporal, as diſtribution of Alms to poor people.

Since

Since *Littleton* wrote, the Book of Common Prayer, *&c.* is altered; yet the Tenure in Frankalmoigne remaineth, and ſuch Prayers and Divine Service ſhall be ſaid and celebrated, as now is authorized: for the change is by general conſent *&c.* of Parliament, 2 *E.6. c.*1. 5. & 6. *c.* 1. 1 *El. c.*2. whereunto every man is party.

And as *Littleton* hath ſaid before in the caſe of Soccage, Sect. 119. The changing of one kind of Temporal ſervices into other Temporal ſervices, altereth neither the name nor the effect of the Tenure: ſo the changing of Spiritual ſervices, *&c.* altereth neither the name, *&c.*

Frankalmoigne eſt le pluis haute ſervice.

——— *fuit hæc ſapientia quondam*
Publica privatis ſecernere, ſacra profanis.

Tant ſolement divine & ſpiritual ſervice en deſtr. fait per terres &c. tenus en Frankalmoigne.

Sect. 136, and 137.

No diſtreſs can be taken for any ſervices that are not put into certainty, nor can be reduced into any certainty.

Oportet quod certa res deducatur in judicium.

And yet in ſome caſes there may be a certainty in uncertainty: as a man may hold of his Lord to ſhear all the ſheep depaſturing within his Manor; and the Lord may diſtrain for this uncertainty, 7 *E.* 3. 38.

Ordinarius, ſo called, *Quia habet ordinariam juriſdictionem in jure proprio, & non per deputationem*; as a Biſhop, *&c.*

Where the right is Spiritual, and the remedy thereof of onely by the Eccleſiaſtical Law, the conuſans thereof doth appertain to the Eccleſiaſtical Court, *fo.* 96. *a.*

And ſo where the Common or Statute Law giveth remedy *in foro ſeculari* (whether the matter be Spiritual or Temporal) the conuſance of that cauſe belongeth to the King's Temporal Courts onely, *&c. fo.* 96. b.

There were within this Realm 118 Monaſteries founded by the Kings of *England*. So all Biſhops, *&c.* which hold

of the King by Barony, and are Lords of Parliament, called by Writ, *&c. Ante fol.* 83, *&* 69.

Sect. 138, and 139.

Nihil quod eſt inconveniens, eſt licitum, fol. 97. b.

It is better ſaith the Law, to ſuffer a miſchief, (that is peculiar to one) than an inconvenience that may prejudice many. 42 *Ed.* 3. 5. 28 *E.* 3. 395. 28 *H.* 6. 28.

There is no land that is not holden of ſome Lord or other, by ſome ſervice Spiritual or Temporal.

Nihil quod eſt contra rationem eſt licitum. For reaſon is the life of the Law; nay, the Commonlaw it ſelf is nothing elſe but Reaſon, which is to be underſtood of an artificial perfection of Reaſon, gotten by long ſtudy, obſervation and experience, and not of every mans natural Reaſon: for, *Nemo naſcitur artifex.*

Neminem oportet eſſe ſapientiorem legibus.

Si un Abbot, &c. alien his lands holden in Frankalmoigne to a ſecular man in fee ſimple; In this caſe, albeit the Alienor held not by fealty nor any other terrene ſervice, but onely by Spiritual ſervices, and thoſe incertain, yet the Alience ſhall hold by the certain ſervice of fealty, *fol.* 98. *a.*

Sect. 140.

Il eſt ordeigne per leſtatut Quia empt. terrum fait 18 Ed. 1. *que nul poit alien, ne grant terres, &c. en fee ſimple a ten de luy meſme.*

Alienatio, licet prohibeatur, conſenſu tamen omnium in quorum favorem prohibita eſt, poteſt fieri, & quilibet poteſt renunciare juri pro ſe introducto.

Præſumitur rex habere omnia jura in ſcrinio pectoris ſui. Diſpenſatio eſt mali prohibiti provida relaxatio, utilitate ſeu neceſſitate penſata, vide libr. & quære, 99. a.

By Preſcription the ſucceſſor of an Abbat may pay relief.

Sect. 141.

Nul poit tenure terres, &c. en frankalm. forſprise del grantor ou de

de ſes heires. Here (or) hath the ſenſe of (and) *&c.* For the heir cannot take any thing in the life of the anceſtor, neither can the heir take any thing by deſcent, when the anceſtor himſelf is ſecluded. *Vide, &c.* As a man cannot grant lands in Tail and reſerve a rent to his heirs. 15 *E.* 4.

The tenure in *Frankalmoigne* is an incident to the inheritable bloud of the grantor, and cannot be transferred or forfeited to any other. But it is not an incident inſeparable, *&c.* For the Lord may releaſe to the tenant in *Frankalmoigne* and then the tenure is extinct, and he ſhall hold of the Lord *Paramount* by Fealty. As in *Littl.* S. 139. And if the Seigniory be transferred by act in Law to a ſtranger, thereby the privity is altered, and the tenure changed. *Fo.* 99. *b.*

And a Biſhop with aſſent of his Chapter, *&c.* may give Lands in *Frankalmoigne*, to hold of them and their ſucceſſors, by licence, *&c.* Alwaies the Seigniory nearer to the Land, drowns the Seigniory that is more remote, *&c.*

Sect. 142.

L' meſne eſt tenus de acquiter ſon Tenant en Frankal. de Cheſe manner *de* ſervice, *que aſc. Seignior. Paramount de luy void demand.* He is alſo to acquit him of improvement of ſervices, as if he be diſtrained for relief, *aid per file mar. &c.* Alſo for ſuit ſervice to a hundred; but for ſuit real in reſpect of reſiance within any hundred, *&c.* it is otherwiſe. There be three kinds of Acquitals. 1. An Acquital by Deed. 2. An Acquital by preſcription. 3. An Acquital by tenure; and that is four manner of ways. 1. By owelty of ſervice, for ſervice acquits ſervice. 2. Tenure in *Frankalm.* 3. Tenure in *Frankmar.* 4. Tenure by reaſon of *Dower. F. N. B.* 135. *&c.* There be ſix Writs in Law maintainable before any moleſtation, *&c.* As 1. A man may have his Writ of Meſne before he be diſtrained. 2. A *Warr. Cartæ.* before he be impleaded. 3. A *Monſtraver.* before any diſtreſs or vexation. 4. An *Aud. quer.* before any execution ſued. 5. A *Curia claudend.* before any default of incloſure. 6. A *ne in-*

juste vexes, before any distress or molestation: and these be called, *brevia anticipantia.*

Nota, the Plaintiff in a Writ of Mesne, may chuse either process at the Commonlaw, or upon the Statute of *West.* 2. And upon process given by the said Statute, *viz.* Summons, Attachment, and grand distress, if the Mesne cometh not, he shall be fore-judged: and the judgment is, *quod T. (le mesne) amittat servitia de A. (le Tenant) de tenementis prædicti, & quod omisso prædicto, T. præfat. R. (le Seignior. Paramount) modo sit attendens & respond. per eadem servit. per quæ T. tenuit.* Also if the Tenant be not acquitted after he hath recovered in a writ of Mesne, he shall have a Writ of *Distringas ad acquietand.* Fo. 100. *Vide, &c. F. N. B.* 138.

If two joyntenants bring a Writ of Mesne, and the one is summon'd and severed, the other cannot fore-judge the Mesne, for he ought to be attendant to the Lord *Paramount*, as the Mesne was, and that cannot he be alone. And so if there be two joyntenants Mesnes, and in a Writ of Mesne, brought against them, one maketh default, and the other appears, there can be no fore-judger. *Vide Liber. & quære.* If the Daughter, the Son being in *venter sa mere*, before judged, it shall bind the Son that is born afterwards; for he had no right at the time of fore-judgment.

CHAP. VII.

Homage Auncestrel.

Sect. 143, *&c.*

HOM. Aunc. est lou un tenant tient sa terre de Son Seig. per Homage, & m. le tenant & ces Ancestors que heire il est aunt tenus m. la terre del dit Seignior & de ses ancestors, &c. de temps, dont memory ne court, per homage, & aunt ſt. a eux

a eux homage. Tiel ſeignior doit garrant. ſon tenant queunt il é implede de la terre, &c.

Auxi il doit acquiter le tenant envers touts Seigniors Paramount *luy de cheſi manner de ſervice. Mes ſi le Seignior navoit recieve pas homage del tenant, &c. Nede aſc' de ſes anceſtors il poit diſclaimer en le tenancy quánt il eſt vouch, & iſſint ouſt le tenant de ſon garrantie.*

Sect. 145.

Eſt tanta & talis connexio per homagium inter dominum & tenentem, quod tantum debet dominus tenenti, quantum tenens domino, præter ſolam reverentiam. Bract. Fo. 78. Glan. li. 9. ca. 4. & Brit. Fo. 107. a.

Ancient continued inheritance on both parties hath more privilege and account in Law, than inheritances lately or within memory acquired. *Fol.* 101. a.

Warrantus, vouchee is either to defend the right againſt the demandant, or to yield him other Land, *&c.* in value, and extendeth to Lands, *&c.* of an Eſtate of Freehold, or inheritance: and not to any Chattel real, perſonal, or mixt, ſaving onely in caſe of a wardſhip granted with warrant; for in the other caſes concerning Chattels, *&c.* The voucher ſhall have his action of Covenant, if he hath a Deed, or if it be by parol, then an action upon his Caſe, or an action of deceipt, *&c.*

The proceſs whereby the vouchee is called is a *Summon. ad Warr.* whereupon if the Sheriff return that the vouchee is ſummoned and he maketh default. *Mag. Cape ad valentiam* is awarded, when if he make default again, then judgement is given againſt the Tenant, and he over to have in value againſt the vouchee. But if the Sheriff return that he hath nothing, then after, Writs of *alias*, and *pluries*, a Writ of *ſequatur ſub ſuo periculo* ſhall be awarded, *&c.* and the demandant ſhall not have judgement to recover in value, becauſe the vouchee was never warned. *Vide Libr. Fo.* 101. *b.*

When the tenant being impleaded within a particular juriſdiction (as in *London*, *&c.*) Voucheth one to warr. and prayes that he may be ſummoned in ſome other County

out of the juriſdiction of that Court: this is called a forrain voucher. By the Civil Law every man is bound to warrant the thing, that he ſelleth or conveyeth, albeit there be no expreſs warrant, but the Commonlaw bindeth him not, unleſs there be a warranty either in Deed, or in Law, for *Caveat emptor, &c.*

There be three kinds of diſclaimer, *i. e.* in the Tenancy, in the bloud, and in the Seigniory. *F. N. B.* 197. & 151. b.

In the caſe of Homage Aunceſtrel (which is a ſpecial warranty in Law, by the authority of *Littleton*) the Lands generally that the Lord hath at the time of the voucher, ſhall be liable to execution in value, whether he hath them by deſcent or purchaſe. But in the caſe of an expreſs warranty the heir ſhall be charged but onely for ſuch Lands as he hath deſcent from the Aunceſtrel which created the warranty. *F. N. B.* 152.

And note, the Lands of the vouchee ſhall be liable to the warranty, that the vouchee hath at the time of the voucher, for that the voucher is in lieu of an Action, and in a *Warr. Cartæ*, the Land which the defendant hath at the time of the Writ brought ſhall be liable to the warranty. *Fo.* 102. a.

Upon a judgment in debt, the Plaintiff ſhall not have execution, but onely of that Land which the Defendant had at the time of the judgment, for that the action was brought in reſpect of the perſon, and not in reſpect of the Land. *Vide Lib. &c.*

If a man give Lands in Fee with warranty, and bind certain Lands ſpecially to warranty, the perſon of the Feoffor is hereby bound, and not the land, unleſs he hath it at the time of the voucher. 32. *E.* 1. voucher 292.

Sect. 146.

En Cheſe caſe lou le Seignior poit diſclaimer, &c. Et de ceo poit diſclaimer en Court de Record, ſon Seigniory ē extinct & le tetant tiendra del Seignior procheine Paramount, &c.

Meliorem conditionem Eccleſiæ ſuæ facere poteſt prælatus

tus deteriorem nequaquam; and again, *Eccleſiæ ſuæ condicimelior. facere poſſunt ſine conſenſu, deteriorem non poſſunt ſine conſenſu.*

Expedit reipublicæ ut ſit finis litium, vide fol. 103. *a.*

If an action of Debt upon an Obligation againſt an Abbat, the Abbat acknowledgeth the action, and dieth, the ſucceſſor ſhall not avoid Execution, though the Obligation was made without the aſſent of the Covent, for he cannot falſifie the Recovery in an higher action. *Et res judicata pro veritate accipitur*; and this is but a Chattel, 7 *Reg.* 2. *tit. Abbat* 7.

Sect. 147, and 148.

If the tenant make a feoffment in fee upon condition, and dieth, his heir performeth the condition, and re-entreth, the *Homage Aunceſtrel* is deſtroyed in reſpect of the interruption of the continuance of the privity and Eſtate, 1. *Mich.* 14, *&* 15 *El.*

Tenant que fiſt homage al pere, ne ſerre homage al fits, fo. 103. *b.* vide le except. ace rule.

Sect. 149, 150, *&c.*

Fealty eſt incident a cheſe' atturnment del tenant grant le Seigniory eſt grant. None ſhall do homage but the tenant of the Land, to the Lords of whom it is holden, *fol.* 104. *a.* 8 *Ed.* 4. 27. *b.**

The recovery of the ſeigniory differeth from the alienation of the Lord, which is his own act, or the deſcent of the ſeigniory to the heir, which is an act in law; for that by the Recovery, the Eſtate of him that received the homage is defeated, for it ſhall not lie in the mouth of the tenant, to falſifie the recovery which was againſt his Lord, *&c.* for that the tenant had nothing therein, *&c.*

If a man had made a Leaſe for years to begin at *Michaelmas*, reſerved a rent, and he had ſuffered a Common Recovery before *Michaelmas*, the Recoverer ſhould diſtrain for rent, which the leſſor before the recovery could not, 28 *H.* 8. *Dyer* 41. *fol.* 104. b.

The tenant ought to ſeek the Lord to do him homage *&c.* for this ſervice is perſonal, *&c.* but rent may be paid and received by other; and therefore a tender of the rent upon the Land is ſufficient, *fo.* 105. *a.*

CHAP. VIII.

Grand Sergeanty.

Sect. 153.

GRand Sergeanty, eſt lou home tient ſes terres del Roy per les ſervices que il doit faire en ſon proper perſon, com de port. la banner del Roy, out ſa lance, &c.

Ceo tenure en ten. per ſervice de Chivalry; mes le livery pas am al Roy pur reliefe, le value (ouſter les charges & reprifes) des terres pur an S. 154, & 158.

Magna Sergeanty; *i. e. Magna Servitium:* becauſe it is greater and more worthy than Knight ſervice; for this is *Revera ſervitium Regale*, and not *Militare*, onely.

This Tenure hath ſeven ſpecial properties: 1. To be holden of the King onely. 2. It muſt be done when the tenant is able in proper perſon. 3. This ſervice is certain and particular. 4. The Relief due, *&c.* differeth from Knights ſervice. 5. It is to be done within the Realm. 6. It is ſubject to neither *Aid pur faire fits Chivaler*, or *file mariage*. And 7. It payeth no Eſcuage, *fo.* 105. *b.* 11 *H.* 4. 34. *F. N. B.* 83.

There were divers Lords Marſhals of *England* before the reign of *R.* 2. yet King *R.* 2. created *Tho. Moubrey* Duke of *Norfolk*, and firſt Earl Marſhal of *England. per nomen Comitis Mariſchalli Angliæ.* in Rot. pat. 20 R. 2.

Theſaurus Regis reſpicit Regem, & Regnum; And *Cenſus Regis eſt anima reipub.* fol. 106. a. *Dyer* 4 *El.* 213.

Where the Grand Sergeanty is to be done to the Royal perſon

perſon of the King, or to execute one of thoſe high and great Offices, there his tenant cannot make a Deputy without the Kings licence, *&c.* But he that holdeth to ſerve him in his War within the Realm, or by Cornage, may make a Deputy, *fol.* 107. a. *vide libr. &c. qu.*

CHAP. IX.

Petit Sergeanty.

Sect. 159.

PEtit Serjeanty eſt lou home tient, &c. del Roy, de rend. al Roy annualment un arke, ou un Eſpee, &c. petit choſes touchant le guerre. Et tiel ſervice ne forſq; Soccage en effect.

If one holdeth Land of a common perſon in groſs as of his perſon, and not of any Manor, *&c.* and this Seigniory eſcheateth to the King (yea though it be by Attainder of Treaſon) he holdeth of the perſon of the King, and not *in Capite*, becauſe the original Tenure was not created by the King. And therefore it is directly ſaid, That a Tenure of the King *in Capite*, is when the Land is not holden of the King, as of any Manor, Caſtle, Honor, *&c.* but of his Crown.

Nota. A man may hold of the King *in Capite*, or of his Crown, as well in Soccage, as by Knights ſervice, *fol.* 191. 4.

CHAP.

CHAP. X.

Tenure en Burgage.

Sect. 162.

EST lou les tenants deins le Burgh ſont tenus del ſeignieur del Burgh per cert' rent, &c. & tiel tenure ne forſque tenure en Socage,

Burgh is an ancient Town holden of the King or any other Lord, which ſendeth Burgeſſes to the Parliament. *fo.* 109. a. l. 10. 123. *Major de Lynns C.*

A City is a Borough incorporate, which hath, or (within time of memory) hath had a Biſhop: and though the Biſhoprick be diſſolved, yet the City remaineth; as *Weſtminſter. Cambridge* an ancient City, *Mich.* 7. *R.* 1. *Rot.* 1. *vid. libr. fo.* 109. *b.*

Cities were inſtituted for three purpoſes: 1. For conſervation of Laws, whereby every man enjoyeth his own in peace. 2. For tuition and defence of the King's Subjects and for keeping the King's peace in time of ſudden uproar. And 3. For defence of the Realm againſt outward and inward hoſtility.

There is *lex & conſuetudo Parliamenti, quæ quidem lex quærenda eſt ab omnibus, ignorata à multis, & cognita à paucis.* Of the Members of this Court of Parliament, ſome be by deſcent, as ancient Noblemen; ſome by creation, as Nobles newly created; ſome by ſucceſſion, as Biſhops; ſome by election, as Knights, Citizens, and Burgeſſes, *fol.* 110. a. *ante* Sect. 3.

The Juriſdiction of this Court is ſo tranſcendent, that it maketh, enlargeth, diminiſheth, abrogateth, repealeth and reviveth Laws, Statutes, Acts and Ordinances, concerning matters Eccleſiaſtical, Capital, Criminal, Common, Civil, Martial, Maritime, *&c.* None can begin, continue or

or dissolve the Parliament but by the Kings Authority.

Of this Court it is said, *Que il enim de tresgrand honor & justice, de que nul doit imaginer chose dishonorable.*

Habet Rex Cur' suam in Concilio suo in Parliamentis suis præsentibus Prælatis, Comitibus, Baronibus, Proceribus, & aliis viris peritis, ubi terminata sunt dubitationes judiciorum, & novis injuriis emersis nova constituuntur remedia, & unicuique justitia prout meruerit retribuetur, Pl. c. 398. *b. d.* Pet. St. c. 55. fo. 164. Flet. l. 2. c. 2.

The King of *England* is armed with divers Councils; as first, *Commune Concilium*, and that is the Court of Parliament. 2. *Magnum Concilium*, and this is sometime applied to the Upper House of Parliament, and sometime out of Parliament time to the Peers of the Realm. 3. The Privy Council. And 4. the Kings Council for Law matters, and they are his Judges of the Law.

Sect. 165, &c.

Ascun Burghs on tiel Custome, que le puisne fits inherita, &c. *Consuetudo quandoque pro lege servatur, in partibus ubi fuerit more uventium approbata, & vicem legis obtinet, longævi enim temporis usus & consuetudinis non vilis authoritas. Longa possessio (sicut jus) parit jus possidendi, & tollit actionem vero domino.* Bracton.

Of every Custom there be two essential parts; Time out of mind, and Continuance and peaceable usage without lawfull interruption.

If Lands be within a Manor, Fee, or Seigniory, the same by the Custom of the Manor, *&c.* May be devisable; or of the nature of Gavelkind, or of Borough English. 21 *Ed.* 4. 53, 54. otherwise is it. In an upland Town, *&c.*

Nota, That in special Cases a Custome may be alledged within a Hamlet, a Town, a Burgh, a City, a Manor, an Honour, an Hundred, and a County: but a Custom cannot be alledged generally within the Realm, *&c.* For that is the Common Law. *Fo.* 110. *b. F. N. B.* 122. *Dyer* 54. By some Customes the youngest brother shall inherit.

Sect.

Sect. 166, and 167.

Item en aſc' Burghs per le cuſtom. feme averá pur ſa Dow touts les tenement que feront a ſa baron, &c. And this call Franke Banke. Here is implied by (*&c.*) that in ſome pl ces the Wife ſhall have the moity of her Husband's Lands, long as ſhe lives unmarried, as in Gavelkind. And of Lan in Gavelkind a man ſhall be Tenant by the Curteſie, witho having of any iſſue.

In ſome places the Widow ſhall have the whole, or hal *Dum ſola & caſta vixerit,* &c. *F. N. B.* 150.

Item, home poit deviſer ſes terres qui il ad en Fee ſimple, *di meſme le Burgh,* &c. A deviſor *per ſon Teſtam.* is to ſpeak h his Teſtament, what his mind is to have done after his d ceaſe. *Teſtamentum eſt duplex,* 1. *In Scriptis.* 2. *Nuncupativ ſeu ſine ſcriptis.* The deviſee, cannot take goods, *&c.* witho the aſſent of the Executours; otherwiſe it is of Lands devi by Cuſtome.

If a man hath Lands holden by Knights ſervice *in Capi* and lands in Soccage, he can deviſe but two parts of the whol But if he hold lands by Knight-ſervice of the King, and *in Capite,* or of a mean Lord, and hath alſo Lands in Socca he may deviſe two parts of his Land holden by Knights ſe vice and all his Soccage Lands. *Vide lib. & quære.* Fo. 111.

If a man make a Feoffment in Fee of his Lands holden Knights ſervice to the uſe of ſuch perſon and perſons, and ſuch Eſtate and eſtates, *&c.* As he ſhall appoint by his Wi in this caſe by operation of Law, the uſe and State veſts the Feoffer, and he is ſeiſed of a qualified Fee. In this Cas if the Feoffor limit Eſtates by his will, by force and accordin to his power, there the uſe and the Eſtates growing out o the Feoffment are good for the whole, and the laſt will but directory. *Vide lib.* &c.

If a gift in Tail, or a Leaſe for life be made the remain der in Fee, this remainder is not within the Statute.

Sect. 168. *Fo.* 112.

By no conveyance at the Common Law a man could di ring

g the Coverture either in poſſeſſion, reverſion or remain-
r limit an eſtate to his Wife. But a man may by his Deed
venant with others to ſtand ſeiſed to the uſe of his wife, or
ke a Feoffment, *&c.* to the uſe of his Wife, and now the
te is executed to ſuch uſes by the Statute of 27 *H.*8. for an
e is but a truſt and confidence, which by ſuch a mean
ight be limited, by the husband to the wife.

*Omnia quæ ſunt uxoris ſunt ipſius viri, non habet uxor poteſta-
m ſui ſed vir. Bract. lib.* 2. *ca.* 15.

*Vir & uxor ſunt quaſi unica perſona quia caro una, & ſanguis
us, res licet ſit propria uxoris, vir tamen ejus cuſtos, cum ſit ca-
t mulieris. Bract.* 5. *tract.* 5. *ca.* 25. *al.* 2. *Baron.* 10 *H.* 720. *Ex-
ix del cem que uſe, poit vend. terres deviſi.*

*In contractibus benigna, in teſtamentis benignior, in reſtitutio-
bus benigniſſima interpretatio facienda eſt voluntas teſtatoris eſt
nbulatoria uſque ad mortem.*

The firſt grant and the laſt will is of greateſt force.

*Cum duo inter ſe pugnantia reperiuntur in teſtamento ultimum
tum eſt.* If a feme covert be ſeiſed of Lands in Fee, ſhe can-
ot deviſe the ſame to her husband; becauſe ſhe is *ſub pote-
ate viri*, &c.

Sect. 169. of 113.

*Item per tiel cuſtome home poit deviſer per ſen teſtamentum quæ
s* executors *point aliewr les tenements* in Fee, &c. *pur cert. ſum.
le* mony *a diſtribut. pur ſon alme, & iſſint. poies veir icy un caſe
u home poit faire loial eſtate. & encore il navoit riens en les te-
ements al temps del eſtate ſt. quia conſuetudo ex certa cauſa ra-
ionabil uſitata, privat communem legem.* Here it appeareth that
the Executours having but a power, as *Littl.* putteth the caſe,
o ſell, they muſt all join in the ſale. *Fo.* 112. *b. Vide*, &c.
Dyer 177.

But if a man deviſeth Lands to his executours to be ſold and
maketh two Executours and the one dieth, yet the ſurvivour
may ſell the Land, becauſe as the ſtate, ſo the Truſt ſhall ſur-
vive; and ſo note a diverſity between a bare truſt, and a truſt
coupled with an intereſt. 39 *Aſſ. p.*17. *Dyer* 210. *and* 371.

By

By the Statute of 21 *H.*8. it is provided that where L
are willed to be ſold by Executours, that though part of t
refuſe, yet the reſidue may ſell. *Lib.* 1. 173.

Mine advice to them that make ſuch deviſe by will is,
make it as certain as they can, as that the ſale be made
his Executours or the ſurvivours or ſurvivour of them, if
meaning be ſo, or by ſuch, or ſo many of them as take u
them the probate of his will, *&c.* And it is better to give t
an authority than an eſtate, unleſs his meaning be
ſhould take the profits of his Lands in the mean time,
then it is neceſſary that he deviſeth, that the mean pr
till the ſale ſhall be aſſets in their hands, for otherwiſe
ſhall not be ſo. *Vide lib.* (*fo.* 113.) Stat. 32. *H.* 8. *c.*2.3
8. *cap.* 5.

Conſuetudo præſcripta & legitima vincet legem. But no
ſtome or preſcription can take away the force of an A
Parliament. *Præſcriptio eſt titulus ex uſu & tempore ſubſta
am capiens ab autoritate legis.* A title taking his ſubſtanc
uſe and time allowed by the Law. 12 *E.*4.1.2. *M. Br. pr.*
6 *E.* 6. *Dy.* 31. 45. *Aſſ.* 8.

Sect. 170.

I. S. Seiſed of the Manor of D. in Fee preſcribeth th
that I. S. his anceſtours, and all thoſe whoſe eſtate he hath
the ſaid Manor, have time out of mind had and u
to have common of paſture, *&c.* in ſuch a place, *&c.* Be
the Land of ſome other, *&c.* as pertaining to the ſaid M
nor. A Cuſtome, is in this manner: A. Copyholder of t
Manor of D. doth plead, *&c.* that all the Copyholders, *&*
have had and uſed to have common of paſture, *&c.* in ſuch
waſte of the Lord, parcel of the ſaid Manor. But both
cuſtomes and preſcriptions theſe two things are incident
ſeparable, *viz.* poſſeſſion, or uſage: and time: Poſſeſſion mu
have three qualities, it muſt be long, continual, and peace
ble. S. 170.

Note, 1. To what things a man may make a title by pre
ſcription without Charter; and 2. How it may be loſt by in
terruption.

ruption. For the first, as to Franchises and liberties as not be seised as forfeited, before the cause of forfeiture pear of Record, no man can make a title by prescription, . as to the Goods and Chattels of Felons, *&c.* to make a roner, *&c. l.* 5. 109. *l.* 9. 29.

But to treasure trove, waifes, estraies, *&c.* to hold Pleas, . A man may make a title by usage onely, *&c.* Without matter of Record (*Fo.* 114. 6.) 9 *H.* 7. 11. 20.

And for the second, it is to be known that the title being ce gained by prescription or custome, cannot be lost by interruption of the possession, for 10 or 20 years, t by interruption in the right, as if a man have had a rent common by prescription, unity of possession of as high and rdurable estate is an interruption in the right. *Vide*, &c. *fo.* 114. *b.*)

A modus decimandi was alledged, *Mich.* 42. and 44 *Eliz. banco Reg.* by prescription time out of mind for tythes of mbs, and thereupon issue joined, and the Jury found at before 20 years then last past there was such a prescrition, and that for this 20 years he had paid the Lambs *in ecie*; and it was objected first, that the issue was found ainst the plaintiff, for the prescription was general, for all e time of prescription, and 20 years fail thereof. 2. That e party by paiment of tythes *in specie* had waived the rescription or custome. But it was adjudged for the laintiff in the prohibition, for albeit the *modus decim.* had ot been paid by the space of 20 years, yet the prescription being found, the substance of the issue is found for the laintiff. *Vide Lib.* &c. *M.* 43. and 44 *Eliz. B. S. Nowell* and *Hicks.*

Note, all the prescriptions that were limited from a certain time, were by Act of Parliament, as from the time of *H.* 1. After that, from the time of *H*, 2. By the Statute of *Merton*; and from the time of *R.* 2 By the Statute of *Westm.* 1. But the prescription of time out of memory of man, was at the Common Law, and limited no time. Memory or knowledge is twofold. First, by knowledge, by proof, as by Record,

cord, or ſufficient matter of writing. 2. by his own pro knowledge. 28. *Aſſ.* 25. 11 *H.* 7. 21. *Dy.* 273.

There is a diverſity between an Act of Parliament in Negative, and in the Affirmative: for an Affirmative doth not take away a cuſtome, as the Statute of Wills of and 34 *H.*8. Do not take away a cuſtome to deviſe Lands. Alſo there is a diverſity between Statutes that be in the gative: for if a Statute in the Negative be declarative of Ancient Law, that is in Affirmative of the common L there as well as a man may preſcribe, *&c.* againſt the co mon Law, ſo a man may do againſt ſuch a Statute. *Fo.* 11 *Vide & qu. M. Carta. c.* 35.

None ſhall cut down any trees of his own within a reſt, without view of the Foreſter. Statute 34 *E.* 1. 4. For *Raſt.* But a man may preſcribe to cut down his woods, 16 *El. in le Eſcheq.*

The common Law appeareth in the Statute of *Mag.* C and other ancient Statutes: (which for the moſt part Affirmative of the Common Law) in original writs, in dicial Record, and in our books of terms and years. A of Parliament appear in the Rolls of Parliament, and the moſt part are in Print. Particular cuſtomes are to proved. *Fo.* 115. *b.*

Sect. 171.

Every City is a Burgh, but every Burgh is not a City. A it appeareth by *Littleton.* that a Town is the *Genus*, and Borough is the *ſpecies*, for he ſaith that every Borough is Town, but every Town is not a Borough. *Et ſub appellatione villarum continentur Burgi & Civitates.* Forteſcue, *cap.* 24.

CHAP. XI

CHAP. XI.

Tenure en Villenage.

Sect. 172.

Tenure en Villunage eſt pluis properment qut. un villein tien terres, &c. *Solonq. le cuſtome del Manner, ou auterment a volunt ſon Seignior, & de faire a ſon Seignior villeine* ſervice; *l terre tenus en villenage ne unſq; ſer. home franke, villaine. Villaine, à villa; quia villæ adſcriptus eſt.*

And therefore a Tenure in Villenage is twofold, one ere the perſon of the Tenant is bound, and the Tenure vile, the other where the perſon is free, and the Tenure vile. *Serva terra liberos de ſanguine exiſtentes, villanos fa- non poteſt, quia licet faciunt opera ſervilia, tamen non faciunt ratione perſonarum, ſed ratione tenementorum*, &c.

A villain, is called *Nativus, à naſcendo; quia plerumq; natus ſervus. Fo.* 116. *b.*

Eſt autem libertas, naturalis facultas ejus quod cuique facere et * *niſi quod de jure, aut vi prohibetur. Servitus eſt conſtitutio jure gentium, qua quis domino alieno contra naturam ſubjicitur. act. l. ca.* 6. It was ordained, for the cruelty of ſome Lords at he that killed his villein, ſhould have the ſame judge- ent as if he had killed a freeman, and thereupon they were lled *Servi, quia ſervabantur à dominis, & non Occidebantur, & n à ſerviendo.*

Servitude was firſt inflicted upon *Cham* for diſhonouring his Father *Noah. Ante vini inventionem inconcuſſa libertas: n eſſet hodie ſervitus ſi ebrietas non fuiſſet.* Ambroſe.

When the villain hath an eſtate of any thing certain, the ord ſhall have it, as a Rent, Commons certain, &c. But the Lord

Lord ſhall not take advantage of any Obligation, or C
nant, or other thing in action made to the villain, be
they lye in privity, and cannot be transferred to others,
St. c. 43. 22. *Aſſ. p.* 37.

Quicquid acquiritur ſervo, acquiritur Dom. Fo. 117. a.

The Statute of *Donis Condic.* giveth remedy to the i
of the Donee (in Taile) that have capacity and power to
and retain ſuch a gift. *Pl. C.* 555. *Walſing. c.*

Modus & conventio vincunt legem.

Sect. 174.

*Aliud eſt tenere liberè, & aliud tenere per liberum Serv
Fleta l.* 3. *c.* 13. *Mirr. ca.* 2. *Sect.* 18.

Sect. 175.

*Cheſc. villaine, ou eſt un villeine pur tille de preſcription
il & ſes Anceſtors ont eſte villeines de temps dont memo
Court, ou il eſt villeine per ſon confeſſion dem. en court de R*
And every Court of Record is the Kings Court, albeit
ther may have the profit, wherein if the Judges do err,
of errour doth lie. But the County Court, the Hundred C
&c. are no Courts of Record; and therefore the proceed
therein may be denied and tried by Jury, and upon
judgments a Writ of errour lieth not, but a Writ of
judgment, for that they are no Courts of Record, be
they cannot hold Plea of debt or treaſures, if the debt o
mages do amount to 40 s. or of any treſpaſs. *Vi & armi
11.* 12. *Gentlemans Caſe.*

Sect. 177.

*Il ferr. adjudge le folly del ſeignieur s'il neutra pas quer
terres*, &c. *ſont en le maine de ſon villeine.*

For before entry, the Lord hath neither *jus in re*, n
ad rem: ſed, nullum tempus occurrit Regi.

The act of law. *i. e.* the deſcent or eſcheat may as
prevent the Lord of his entry, as the act of the party
alienation, *fo.* 118. a. 9 *H.* 6. 21.

Go

Goods or Chattels are either perſonal, as a horſe and other
ſts, houſhold-ſtuff, *&c.* or real, as terms for years of
nds, *&c.* Wardſhips, the intereſt of tenant by Statute Sta-
, *&c.*

Nota, That as the title of Lord to his villains Lands, be-
neth by his entry; ſo his title to the goods beginneth by
ſeiſure of them.

Si le ſeignieur claime les biens & feiſiſt parcel en noſm. de
ſin de touts les biens que le villeine ad ou aver poit, &c.

Such a claim doth not only veſt the goods which the vil-
n then hath, but alſo which he after that ſhall acquire
d get.

Sect. 179.

Le ſeignieur poit maintenant claime le reverſion de ſon vil-
ne, car en aulter forme il ne poit vener al reverſion.

And the Lord cannot claim the reverſion, but upon the
nd, and he by his coming upon the Land for that purpoſe
no Treſpaſſer.

Sect. 180.

Iſſent le ſeigneur, &c. *poit vener al eſgliſe & claim le Ad-*
voſon ac ſon villein, &c. for every claim or demand to deveſt
y eſtate or intereſt, muſt be made in that place, which is
oſt apt for that purpoſe.

Advowſon of a Church is the Right of Preſentation or
llation to the Church. Every Church is either Preſenta-
e, Collative, Donative, or Elective.

If the Church be Preſentative, the Church is full by ad-
iſſion and inſtitution againſt any common perſon; but
ainſt the King it is not full before induction, *fo.* 119. b.

Incumbent, of *incumbo*, *i. e.* to be diligently reſident, *id eſt*,
nixe operam dare, 10 H. 6, 7.

A Church Preſentative may become void five manner of
ys, *viz.* 1. By Death. 2. By Creation. 3. By Reſignation.
By Deprivation. 5. By Ceſſion, as by taking a Benefice in-
patible, *fo.* 120. a. *F. N. B.* 31, 32.

By

By the Statute of 31 *Eliz.* the Preſentation, Admiſſ Inſtitution, and Induction into a Benefice by Simony, made void; which before were but voidable by Deprivat Note: If the Church becometh void, albeit the pre avoidance be not by law grantable over, yet may the L of the villain preſent, *&c.* and thereby gain the inherit of the Advowſon, *&c.* becauſe it is not merely a Choſe action; for if a feme covert be ſeiſed of an Advowſon, the Church becometh void, and the Wife dieth, the band ſhall preſent, *&c.* but otherwiſe it is of a bond to the Wife, becauſe that is merely in action, 14 *H.* 4 43 *E.* 3. 10. 39 *E.* 3. 5. 4 *H.* 6. 5.

Sect. 181.

Ou le villaine & ſes Anceſtors ont eſte regardant al Man le ſeignieur grant mes les villeine par ſon fait a un anter, d il eſt villeine en gros. He is called Regardant to a Manor cauſe he hath the charge to all baſe and villanous ſer within the ſame, *&c.* and his ſervice is not certain, b muſt have regard to that which is commanded him. In g is that which belongs to the perſon of the Lord, and longeth not to any Manor Lands, *&c. Auxi ſont villain groſs par preſcript. &c.* Mirr. c. 2. ſect. 18.

Sect. 183.

A man cannot preſcribe in any thing by a *que eſtate*, lieth in grant, and cannot paſs without Deed or Fine, in him and his Anceſtors he may, becauſe he comes in deſcent, without any conveyance. Neither can a man p a *que eſtate* in himſelf, of any thing that cannot paſs wit Deed, but in another he may, as in bar of an avowry, Plaintiff may plead *que eſtate* in the ſeigniory in avow 39 *H.* 6. 8. *fo.* 121. *a.*

When a thing that lieth in grant is but a conveyanc the thing claimed by preſcription, there a *que eſtate* ma alledged of a thing that lieth in grant, as a man may ſcribe, that he and his Anceſtors, *&c.* in an hundred,

time out of mind, *&c.* had a Leet, *&c.* 11 *H.* 4. 89. The Plaintiff ſhall not entitle him by a *que eſtate*, but he muſt ſhew how he came by it, but after avowry made the Plaintiff ſhall plead a *que eſtate*, becauſe he is now become as a Defendant, 9 *E.* 4. 3. *b.*

A man may plead a *que eſtate* of a tenancy in tail, or an eſtate for life, ſo as he averreth the life of them, otherwiſe it is of leaſe for years, or at will, 41 *Aſſ.* 2. A Diſſeiſor, Abator, Intruder, Recoverer, or any other that cometh in the poſt, ſhall plead a *que eſtate*, 22 *H.* 6. 34. 6 *E.* 4. 12. 31 *H.* 8. *que eſtate*, Br. 48.

A *que eſtate* muſt be alledged in the tenant or defendant himſelf, and not in one in the mean Conveyance from whom he claimeth, 11 *H.* 4. 81. 9 *E.* 4. 3. 1 *E.* 6. *que eſtate*, Br. 49.

A Deed pleaded out to be ſhewed to the Court, becauſe every deed muſt prove it ſelf to have ſufficient words in Law, whereof the Court muſt adjudge, and alſo to be proved by witneſſes, and other proof if the Deed be denied, which is matter of fact, *fo.* 121. *b.* A manor may paſs by livery of ſeiſin without Deed, with all things appertaining, *&c.* without ſaying, *cum pertinent. &c.*

Sect. 184.

Nul choſe en regardant a un Manor, &c. forſque villeine, mes autem choſes come Advowſons, &c. ſont appendants, &c.

Appendants are ever by preſcription, but appurtenants may be created in ſome caſes at this day, *fo.* 121. *b.*

Things incorporeal which lie in grant, as Advowſons, Villains Commons, *&c.* may be appendant to things corporeal, as a Manor, Houſe, and Lands; or things corporeal to things incorporeal, as Lands to an Office. But yet they muſt agree in nature and quality, for a Common of Turbary, or of Eſtovers, cannot be appendant or appurtenant to land, but to a houſe to be ſpent there, *vide lib. &c.*

Item, Nothing can be properly appendant or appurtenant, *&c.* unleſs the principal or ſuperior thing be of perpe-

tual ſubſiſtence and continuance. Offices of fee, are of perpetual ſubſiſtence, either being *in eſſe*, or in that they are grantable over, *fo.* 121. a. *vide*, &c.

Note, That an Advowſon at one turn may be appendant, and at another turn in groſs; as if the Manor be divided between Coparceners, and every one hath a part of the Manor, without ſaying any thing of the Advowſon appendant, the Advowſon remains in Coparcenary, and yet in every of their turns, it is appendant to that part which they have, and ſo it is if they make Compoſition to preſent againſt common right, yet it remains appendant. But if upon ſuch a partition an expreſs Exception be made of the Advowſon, then the Advowſon remains in Coparcenary and in groſs, and ſo are the books reconciled, 13 *E.* 2. *qu. imp.* 170. 9 *El. Dyer* 249. 2 *H.* 7. 5. *vide*, &c.

If a man purchaſe part of the Land wherein common appendant is to be had, the Common ſhall be apportioned, becauſe it is of Common right, but not ſo of a Common appurtment, or of any other Common of what nature ſoever. But both Common appendant and appurtment ſhall be apportioned by alienation of part of the Land, *&c.* and in Common appurtment one muſt preſcribe, *i. e.* for Beaſts not commonable, as Swine, Goats, *&c. l.* 4. 35, &c. *Tirringhams* Caſe.

A Common in groſs appertaineth to no Land, and muſt be by writing or preſcription. *Fo.* 122. *a.*

If a tenancy eſcheat the Lord *ne in ereſa ſon common car eſt apert. al dems. & nemy al ſervices.*

A man may preſcribe to have *Separalem paſturam*, or to have *ſolam veſturam terræ*, from ſuch a day till ſuch a day, and hereby the owner of the ſoil ſhall be excluded to paſture or feed there. So a man may preſcribe to have *ſeparalem piſcariam* in ſuch a water, and the owner of the ſoil ſhall not fiſh there, but if he claim to have *Communiam piſcariæ*, or *liberam piſcariam*, the owner of the Soil ſhall fiſh there, 3 *E.* 3. 29. 30. 20 *H.* 6. 4. 10 *H.* 7. 24.

A man ſeiſed of Land, whereunto Common is appendant, and

and is diſſeiſed, the Diſſeiſee cannot uſe the Common untill he entreth into the land, *&c.* becauſe it ſhould be a prejudice to the tenant of the ſoil; for if the Diſſeiſee might do it, the Diſſeiſor alſo might put on his cattel, which ſhould be a double charge to the Tenant. But otherwiſe it is in caſe of an Advowſon appendant, *&c.* 19 *H.* 6. 33. *vide Sect.* 541.

Sect. 185, and 186.

Si home voile en Court de Record ſoy conuſter deſt villeine, que ne fuit villeine adevant, tiel eſt villeine en groſſe.

This is intended where he is brought into Court by courſe of Law, *Vide libr. &c. fo.* 122. *b.* 26. *Aſſ.* 62. 37. *Aſſ.* 17.

Feme que eſt utlage enim dit waive waiviata, i. e. *derelicta*, left out, or not regarded, and not *utlegata*, or *exlex*; for that women are not ſworn in Leets, or Tourns, as men which be of the age of 12 years or more be, *vide, &c. Reg. Orig.* 132. 3. *H.* 5. *tit. Utlawry Statham.*

Sect. 187, &c.

Lex Angliæ nunquam matris ſed ſemper patris conditionem imitari partum judicat. Surculus totum alimentum à ſtipite capit, poma tamen edit ſua. Forteſcue, c. 42.

Si mulier ſerva copulata ſit libero, &c. *quod partus habebit hæreditatem, & mater nullam dotem, quia mortuo viro libero redit in priſti um ſtatum ſervitutis niſi hæres ei dotem fecerit de gratias.* Bract. lib. 4. fo. 298. b.

A child was born after the father deceaſed *per undecim dies poſt ultimum tempus legitimum* (*ſc.* nine months, or forty weeks) *mulieribus conſtitutum*; and it was adjudged, *Quod dici non debet filius, &c. Trin.* 18. *E.* 1. *Rot.* 61. *Beaſ. coram Rege.*

Un villeine n'avar action envers ſon ſeigneiur; mes en ſpecial caſes, &c. *il poit aver action*, &c. *ſi come appeal de murt ſon pere*, &c. *Auxi un Nieſe avant un appeale de*

Rape en vers ſa ſeignieur. Weſt. 1. cap. 13. Weſt. 2. cap. 3

Sect. 191, and 192.

The Villain ſhall have an action as Executor againſt his Lord, and it is no plea for the Lord to ſay, that the Plaintiff is his Villain, for he ſhall not be enfranchiſed by the uſe of this action, becauſe he hath it by a gift in Law to the uſe of the Teſtator, and not to his own uſe. Note, Damages recovered by the Executor in an action of Treſpaſs ſhall be aſſets and yet they were never in the Teſtator, 21 *E.* 4. 4. *b.* 1 *H.* 4.

Not onely tenant in tail, and tenant for life of a Villain ſhall have the perquiſite of the Villain in fee, but tenant for years, and tenant at will alſo ſhall have it in fee; for the Law reſpecteth not the quantity of the Eſtate, but the Law reſpecteth the quality; for in what right he hath the Villain, in the ſame right he ſhall have the perquiſite, *&c.* For if a man hath a Villain in the right of his wife, and after he is intitled as tenant by the Curteſie in his own right, he ſhall have the perquiſite to him and his heirs, *vide lib. &c. fo.* 124. *b.*

Proteſtation is an Excluſion of a Concluſion, that a party to an action may by pleading incur; or it is a ſafegard to the party which keepeth him from being concluded by the plea he is to make, if the iſſue be found for him: but in this caſe without a Proteſtation, albeit the iſſue be found for the Lord, the Villain ſhall be enfranchiſed. *S.* 192. *Pl. c.* 296. in *Greyſbrook's* Caſe.

Sect. 193.

Three things be favoured in Law, Life, Liberty, Dower.

Tryal, is to find out by due examination the truth of the point in iſſue or queſtion between the parties, whereupon Judgement may be given.

Quæſtio juris, ſhall be tryed by the Judges either upon a Demur, ſpecial Verdict, or Exception, for *cuilibet in ſua arte perito eſt credendum, & quod quiſque norit in hoc ſe exer-*

ceat

zat, & ad quæſtionem juris non reſpondeant juratores: But *queſtio facti* ſhall be tryed by the Verdict of Twelve men, *fo.* 125. *a. vide, &c.*

If the Jury cometh out of a wrong place, or returned by a wrong Officer, and give a Verdict, Judgement ought not to be given upon ſuch a Verdict, *qu. &c.*

Every tryal muſt come out of the Neighbourhood of a Caſtle, Manor, Town, or Hamlet, or place known; out of a Caſtle, *&c.* as ſome Foreſts, *&c.* for that the inhabitants, *&c.* may have the better and more certain knowledge of the fact, 3 *E.* 3. 73. 20 *H.* 6. 30. 7 *H.* 4. 27.

Every plea concerning the perſon of the Plaintiff, *&c.* ſhall be tryed where the Writ is brought. Where the matter alledged extendeth into a place at the Commonlaw, and a place within a Franchiſe, it ſhall be tryed at the Commonlaw.

In an action againſt two, the one pleads to the Writ, the other to the action, the plea to the Writ ſhall be firſt tryed, for if that ſhall be found, all the whole Writ ſhall abate, and make an end of the buſineſs, 8 *E.* 4. 24.

In a plea perſonal againſt divers Defendants, the one Defendant pleads in bar to parcel, *&c.* and the other pleads a plea which goeth to the whole, *ſc.* to both Defendants; this laſt plea ſhall be firſt tryed: for in a perſonal action the diſcharge of one is the diſcharge of both; but in a plea real it is otherwiſe, 15 *E.* 4. 25. b. *&c. vide lib. &c. fo.* 125. b. 9 *H.* 6. 46.

Where an iſſue is joyned for part, and a Demur for the reſidue, the Court may direct the tryal of the iſſue, or judge the Demur firſt, *&c. l.* 5. 36. b.

Omnis conſenſus tollit errorem, fol. 1126. *a.* *.

Iſſue, *exitus*, a ſingle, certain and material point iſſuing out of the allegations or pleas of the Plaintiff and Defendant, conſiſting regularly upon an Affirmative, and Negative, to be tryed by Twelve men; and it is twofold; A ſpecial Iſſue, as here in the caſe of *Littleton*; or general, as in Treſpaſs, Not guilty, in Aſſiſe, *nul tort, nul diſſeiſin, &c.*

And as an Iſſue natural cometh of two ſeveral perſons, ſo a Iſſue legal iſſueth out of two ſeveral Allegations of adver parties, *vide* Sect. 414.

An Iſſue being taken generally, referreth to the Cour and not to the Writ, 7. *E.* 3. 34. *vide*, &c.

A ſpecial Iſſue muſt be taken in one certain materi point which may be beſt underſtood and beſt tryed, 20 E. Iſſue 31. 22. *E.* 4. 28.

An Iſſue ſhall not be taken upon a Negative pregna which implieth another ſufficient matter, but upon th which is ſingle and ſimple, as *Ne dona pas par le ft.* imply giſt by Parol, therefore the Iſſue muſt be *Ne dona pas m & forma.* 21 *H.* 6. 9. b. 16. *E.* 4, 5.

An Iſſue joyned upon an *Abſq; hoc*, &c. ought to have a Affirmative after it: Two Affirmatives ſhall not make an Iſſ unleſs it be leſt the Iſſue ſhould not be tryed. 18. *Eliz.* Dy 253. 22. *H.* 6. 19. 11. *H.* 4. 79.

Some Iſſues be good upon matter Affirmative and Neg tive, albeit the Affirmative and Negative be not in prec words; as in Debt upon a leaſe for years, the Defend pleads that the Plaintiff had nothing at the time of th leaſe made, the Plaintiff replies, that he was ſeiſed in fee; th this is a good Iſſue. 2 *H.* 7. 4. 5. *H.* 7. 12. 26. *H.* 8. in fi *medon.*

Where the Iſſue is joyned of the part of the Defendan the entry is *& de hoc ponit ſe ſuper patriam*; but if it be o the part of the Plaintiff, the entry is *& hoc petit quod inqui ratur per patriam*, 26 *H.* 8. 3. St. *Eliz. Dyer* 353.

There be Negative pleas, that be iſſues of themſelves, where unto the Demandant or Plaintiff cannot reply, no more tha to a general Iſſue, which is, *Et prædictus.*

A, *ſimiliter*, As if the tenant do vouch, and the Deman dant counterplead, That the Vouche or any of his Anceſtor had any thing, *&c.* whereof he might make a feoffment, he ſhall conclude, *Et hoc petit quod inquir' per patriam, & pra tenens ſimiliter.* So in a fine pleaded by the tenant, *&c.* the Demandant may ſay, *quod partes finis nihil habuerunt, & hoc petit*

petit, &c. And ſo in a Writ of Dower, the Tenant plead *unques ſeiſie Dower*, he ſhall conclude, *Et de hoc ponit ſe*, &c. 22 *H.* 6. 57. 59. 3. *H.* 7. 7. 9. 12. *E.* 4. 13.

Filiatio non poteſt probari, and therefore the iſſue muſt be whether the wife was *enſenit* the day of her husbands death. 21. *E.* 3. 11. b.

A proteſtation availeth not the Party that taketh it, if the iſſue be found againſt him; except in ſome ſpecial Caſe *, as if a man enter into warranty, and taketh by proteſtation the value of the Land, albeit the plea be found againſt him, yet the proteſtation ſhall ſerve him for the value. 10 *E.* 4. *Proteſt.* 5. *Vid. S.* 192. * 30. *E.* 3. 14.

Sect. 194.

Si le Seignior Mayhem ſon villeine, il ſer. de ceo endite a le fait del roy, & ſil ſoit de ceo attaint il ſerr. un fine al roy. Mes le villein nava, &c. *appeal de Mayhem*, becauſe that in appeal he ſhall recover but damages, which the Lord after execution might take again, and ſo the judgment *inutile & illuſory*, and the Law never giveth an action, when the end of it can bring no profit or benefit to the pl. 1 *H.* 4. 6. b.

Mahemium (*i. e.*) *membri mutilatio. Endite* (*i. e.*) an accuſation found by an enqueſt of 12, or more upon their oath: ἐνδείκνυμι, to accuſe.

Finis Sumitur tripliciter.
1. For a pecuniary puniſhment for an offence, *&c.* againſt the King.
2. For a ſum given by the Tenant to the Lord.
3. For the higheſt and beſt aſſurance of lands.

If a *præcipe* be brought againſt an infant, and hanging the Plea, he cometh of full age, he ſhall be amerced for the delay after his full age. *Lib.* 5. *fo.* 49. *Vaughans Caſe.*

So if the demandant or plaint. be nonſute, or judgment given againſt him, he ſhall be likewiſe amerced *pro falſo clamore. Vide lib. fo.* 126. *b. &c.*

If a Writ do abate by the act of the demandant or plaintiff, or for matter of form, the demandant or plaintiff ſhall be amerced, but if it abate by the act of God, as by the death

of one, &c. it is otherwiſe. *Lib.* 8. *fo.* 60. b. *Becher's* Caſe.

Wit, *wita*, *Bote*, *wera* or *were* old Saxon words, ſignifie amerciament or compenſation, &c.

Ranſome ne forſque redemption *de paine corporeal pro fine des deniers. Mirror ca.* 1. *S.* 1. and 3.

Ranſome is ever when the Law inflicteth a corporal puniſhment by impriſonment, (and ſo is alſo a fine) but otherwiſe it is of an amerciament.

Alwaies at the Commonlaw when the Defendant ſhould loſe life or member, the Writ ſaid *Felonice*, &c.

And now albeit the Law be changed (for the Plaintiff ſhall recover but damages (yet the Writ of appeal ſaith ſtill *felonice*. *Vita & membra ſunt in manu, ſeu poteſtate regis.* Bract. Lib. 1. fo. 6.

This offence of *Mayhem*, is under all felonies deſerving death, and above all other inferior offences.

Inter crimina majora minimum, & inter minora maximum. Inutilis labor & ſine fructu non eſt effectus legis. Non licet, quod diſpendio licet. Sapiens incipit a fine. Lex non præcipit inutilia.

Therefore the Law forbiddeth ſuch recoveries, whoſe ends are vain, chargeable and unprofitable.

Sect. 195.

Demandant and Tenant, in real actions; Plaintiff, and Defendant in actions perſonal and mixt. In a perſonal action brought by *A. B.* againſt *C. D.* the defence is, and *prad. C. D. defendit vim & injuriam quando*, &c. *Et damna, & quicquid quod ipſe defendere debet.* Vide Libr. &c. fo. 127. b.

The Defendant in this and the like action can plead no Plea at all before he make himſelf party by this part of the defence. 1 *E.* 4. 15.

Sect. 196, &c.

6. *Maners de homes y ſont queux ſils ſuont action judgement poit eſtr. demand ſils ſerront reſpons*, &c. 1. *Lou villein ſuiſt action envers ſon Seignior.* 2. *Lou hom. eſt utlage, jnr act de dept. trns.* &c. *ou enditement.* 3. *Un alien*, &c.

4. *Un*

4. *Un home que per judgment done envers luy ſur un brē de premunire facias, &c. ē hors del protection le roy.* 5. *Un home enter, &c. en* Religion. 6. *Un home que eſt excommenge per le ley de St. Eſgliſe. Sils ſorront reſpondus, &c.* This is the legal concluſion of the plea, when the plea is in diſability of the perſon. *Fo.* 128. a.

By the Commonlaw, the Plaintiff, or Defendant, the Demandant or Tenant could not appear by attorney, without the Kings ſpecial Warrant by Writ, or Letters Patents.

Abuſion ē a retetner Attorny ſans brē de la Chancery, Mirr. ca. 5.

Attorneys point eſtr. touts ceux, aux queux, lex voile ſuffer, ſems ne poient eſte. Attor. ne enfans, ne ſerfs, ne nul que ē en garde nou auterment faut de foy, ne nul criminous, ne nul eſſoigne, ne nul que neſt a le foy le roy nul que ne poit eſte Counter, &c. Mir. ca. 2. *Sect.* 21.

If an executor, *&c.* Sueth any action, utlary in the Plaintiff ſhall not diſable him, becauſe the ſuit is in *auter droit*, 21 *E.* 4. 49. b. 21 *H.* 6. 30. b.

In a Writ of error to reverſe an utlary, utlary in that ſuit, or at any ſtrangers ſuit ſhall not diſable the Plaintiff, becauſe if he in that action ſhould be diſabled, if he were outlawed at ſeveral mens ſuits, he ſhould never reverſe any of them. 7 *H.* 4. 40.

When any man pleads an outlawry in diſability of the perſon he muſt ſhew forth the Record of the Outlawry, *Maintenant ſub pede ſigilli* (becauſe the plea is dilatory) unleſs the Record be in the ſame Court. But if he plead an outlawry in bar, if it be denied, he ſhall have a day to bring in. 6 *Eliz.* Dyer 228. *F. N. B.* 241. Stanf. *pl. cor.* 105.

Note, there be two kinds of appearances before the *Quinto exactus*, to avoid the outlawry, *viz.* an appearance in Deed, *i. e.* to render himſelf, *&c.* and the other is by apparance in Law, *i. e.* by purchaſing a *ſuperſedeas* out of the Court where the Record is, *&c. Tr.* 44 *El. in Co. banco inter Mere & Dolburie.*

If the ground or cauſe of the action be forfeited by the Outlawry, then may the Outlawry be plead in bar of the

action, as in an action of debt, detinue, *&c.* But in real a-
ctions, or in perſonal, where damages be incertain, (as in
trns. of Battery, of goods, of breaking his cloſe, *&c.*) and are
not forfeited by the outlawry, their outlawry muſt be plead-
ed in diſability of the perſon. 9 *Eliz. Dyer* 262. 7 *H.* 4. 4. *b.*
5. 109. *Foxleyes* C.

In the reign of King *Alfred*, and after the Conqueſt, no
man could have been outlawed, but for Felony, the puniſh-
ment whereof was death, *Mir. c.* 1. S. 3.

Utlagatus & waiviata capita gerunt Lupina, quæ ab omnibus impunè poterunt amputari, merito enim ſine lege perire debent, qui ſecundum legem vivere recuſant. Fleta *lib.* 1. *cap.* 27. But now the Law is changed, for avoiding of inhumanity, *&c. Vide* 2 *Al. Pl.* 3. 2 *E.* 3. *tit. Coron.* 148.

In *Bracton's* time, and ſomewhat before, proceſs of outlawry was ordained to lye in all actions that were, *qu. vi, & armis*, which *Bracton* calleth *delicta*, for there the King ſhall have a fine. But ſince by divers Statutes Proceſs of outlawry doth lye in Account, Debt, Detinue, Annuity, Covenant, Action *ſur le* Caſe, Action *ſur le* Statute. *De* 5 *R.* 2. and in divers other common or civil actions, *Bract. lib.* 5. *fo.* 421. 8 *H.* 6. 9. *b.* 4 *E.* 3. 5, *&c.* 35 *H.* 6. 6. 40. *E.* 3. 2.

Sect. 198.

If an alien had iſſue in Engliſh before his denization, that iſſue is not inheritable to his Father; but if his Father be naturaliz'd by Parliament, ſuch iſſue ſhall inherit.

Ligeantia eſt vinculum fidei, ligeantia ē legē eſſentia. Ea eſt duplex, 1 *Perpetua, & iſta ligeantia eſt aut nata, aut data.* 2 *Temporanea, quæ ē aut localis, aut limitata, ſc. denizatio pro vita, &c.* Vide libr. fo. 129. *a.*

A man may be born out of the realm of *England*, yet within the legeance, as in *Ireland*, &c.

An alien that is in league ſhall maintain perſonal action, for an alien may trade, *&c.* but not real or mixt actions. An alien that is condemned in an information, ſhall have a Writ of errour to relieve himſelf, *& ſic*, &c.

If an Alien be made a Prior or Abbot, the Plea of Alien nee ſhall not diſable him to bring any real or mixt action concerning his houſe, becauſe he is in *auter droit.* 29 E. 3. Br. Denizen. 15. *Sic vide diverſitat.*

In *Littletons* Caſe the tenant or defendant ſhall neither plead Alien nee to the Writ, or to the action, but in diſability of the perſon as in villenage or outlawry; and *Littleton* is to be intended of an Alien in league; for if he be an Alien enemy, the defendant may conclude to the action. *Liure de en tries Alien.* 1.

Sect. 199.

The judgement in a *Præmunire,* is that the defendant ſhall be from thenceforth out of the King's protection, and his lands and tenements, goods and chattels forfeited to the King, and that his body ſhall remain in priſon at the King's pleaſure. And a man might doe to him as to the King's enemy, and a man may lawfully kill an enemy. 24 *H.* 8. *Brook Coron.* 196.

But by the Statute 5 *Eliz. ca.* 1. It is not lawfull for any perſon to ſlay any perſon attaint. in *præmunire, &c.* Tenant in tail attaint. in a *præmunire* ſhall forfeit the Land, but during his life. *Vide leſtat.* 16 *R.* 2. *c.* 5.

There be three things whereby every ſubject is protect. *viz. Rex, Lex, & reſcripta regis.* The law is the rule, but it is mute; The King judgeth by his Judges, and they are *lex loquens.* The proceſs and the execution which is the life of the Law, conſiſteth in the King's Writs. *Rex tuetur legem, & lex tuetur jus.*

A man attainted of Treaſon, or Felony, is diſabled to bring any action, for he is, *extra legem poſitus,* and accounted in Law *civiliter mortuus.* 4 E. 4. 8.

There is a general protection of the King, and this extends to all the Kings loyal ſubjects, *&c.* and there is a particular protect. by Writ, *&c.* And this is of two ſorts, one to give a man immunity from actions or ſuites. The ſecond, for

the ſafety of his perſon, ſervants and goods, lands, *&c.* from unlawfull moleſtation, or wrong.

The firſt is of right, and by law, the ſecond are all of grace, (ſaving one) for the general Protection implieth as much. Of the firſt ſort ſome are, *cum clauſula (volumus)* and of theſe protections,

There be four kinds, *viz.* 1. *Quia profecturus.* 2. *Quia moraturus.* 3. *Quia indebitatus nobis exiſtit* of the matter. 4. When any ſent into the King's ſervice in war is impriſoned beyond Sea. The former two are for ſtaying of ſuits and actions in general; and for theſe, nine things are to be obſerved. 1. The cauſe of granting the protect' muſt be expreſſed, *&c.* and it is of two natures, the one concerns ſervice of war, as the King's Souldier, *&c.* The other wiſedom and counſel, as the King's Ambaſſador, *pro negotiis regni*, both theſe being for the publique good of the Realm, private mens actions and ſuits muſt be ſuſpended for a convenient time; for *jura publica anteferenda privatis, & jura publica ex privatis promiſcue decidi non debent.* A man in execution, *in ſalva cuſtodia*, ſhall not be delivered by a protection. 5. *Mar.* 162 *Dyer.*

2. Theſe protections are not allowable onely for men of full age, but for men within age, and for women as neceſſary attendants upon the Camp, and that in three Caſes, *quia latrix, ſeu nutrix, ſeu obſtetrix.* 19 *H.* 6. 51. *Vide lib. & qu. fo.* 130. *a. F. N. B.* 28. *l.*

Corpor. aggreg. of many are not capable of *protect. profecturæ*, or *moraturæ*, for the *Corpor.* it is inviſible.

In every action or plea real or mixt againſt two, *&c.* a protection caſt for the one doth put the plea without day for all, as in debt, *&c.* 9 *E.* 3. *Prot.* 80. 81,

3. A *protect. profecturæ* muſt not be purchaſed, *pendente plito.* unleſs it be in a voyage royal: But otherwiſe it is, of a *protect. Moraturæ.* 3 *H.* 6. *prot.* 2.

A protection cannot be caſt, but when the party hath a day in Court, and when if he made default, it ſhould ſave his default, *&c.* 4. (6 *H.* 22.)

If

If a man hath a protection and notwithſtanding plead a plea yet at another day of continuance, after that a protection may be caſt, ſo at a day after an exigent, but after appearance he cannot caſt a protection in that term, untill a new continuance be taken,* 22 *F.* 3. 4.

And no *protect.* either *Profect.* or *Morat.* ſhall endure longer than a year and a day, next after the teſte or date of it. 39 *H.* 6. 39.*

4. The protection muſt be to ſome (certain) place out of the Realm of *England. Lib.* 7. *fo.* 8. *Calvin's* Caſe.

5. In ſome action Protection ſhall not be allowed by the Commonlaw as of appeals of Felony, and *Mayhem*; ſo it is where the King is ſole party, *&c.* And, in a *Decies tant.* where the King and the ſubject are Plaintiff.

But in late acts of Parliament, Protections in perſonal actions are expreſly ouſted. *Bract. Lib.* 5. 139. *&c.*

In a Writ of Dower *unde nihil habet*, in a *qu. imp.* or *aſſ.* of *Darr. preſentment*, in *aſſ.* of no *diſſ.* In a *qu. non miſit*, *&c.* no protection is allowable. *Vide.*

By act of Parliament no protection ſhall be allowed in attaint nor in action againſt a Gaoler for an eſcape; nor in pleas of trns. or other contract made, *&c.* after the date of the ſame protection. 23 *H.* 8. *ca.* 3.

Note in judicial Writs which are in nature of actions where the party hath day to appear, there a protection doth lie, as in Writs of *Scire fac.* upon Recoveries, Fines, Judgments, *&c.* So it is in a *quid Juris clamat*, *&c.* But in Writs of execution, as *habere fac. Seiſ. Elegit*, execution upon a Statute. *cap. ad Satisf. Fieri fac.* There no protection can be caſt for the Defendant. *cauſa qua ſupra.* 13 *E.* 3. *Prot.* 72.

6. No Writ of protection can be allowed, unleſs it be under the great Seal, and it is directed generally, *Libr.* 2. *fol.* 17. *Lane's* Caſe, *lib.* 8. *fol.* 68. *Trallop's* Caſe, 35. *Hen.* 6. 2.

7. The Courts of Juſtice are to allow or diſallow of the Protection, *&c.* be they Courts of Record or not, and not the Sheriff, or any other Officer, 43 *E.* 3. *Prat.* 96.

8. The

8. The protection may be caſt by a ſtranger, or by party himſelf; an Infant feme convert, *&c.* may caſt a p tection for the tenant or Defendant. And the Defend or tenant caſting it, he muſt ſhew cauſe wherefore, but a ſtranger need not ſhew any cauſe, but that the nant or defendant is here by protection, 21 *E.* 4. 18. 38 *H* 13.

9. A protection may be avoided: 1. By the caſting it before it be allowed. 2. By repeal thereof after it allowed; by diſallowing of it many ways, as for that lieth not in that action, or that he hath no day to caſt it, for material variance between the Protection and the R cord, or that it is not under the Great Seal, *&c.* 3. After be allowed by *innoteſcimus*, as if any tarry in the Countr without going to the ſervice, *&c.* over a convenient ti after he had any Protection, or repair from the ſame t vice, upon information thereof to the Lord Chancellour ſhall repeal the protection by *Innoteſcimus*, 13 *R.* 2. *cap.* 21 *E.* 4. *vide lib.* 131. *a.* & *b.*

As to the third Protection, *cum clauſula volumus* the K by his prerogative is to be preferred in payment of his d ty or debt, by his Debtor, before any Subject, *Regis* 281. b.

Theſaurus Regis eſt fundamentum belli & firmamentu pacis.

By the Statute of 25 *E.* 3. *cap.* 19. the other creditors ma have their actions againſt the King, debtor, and proceed t Judgement, but not to Execution, unleſs he will take up on him to pay the King's debt, and then he ſhall have Exe cution for both the two debts.

But in ſome caſes the Subject ſhall be firſt ſatisfied, viz. where the King is intitled to any fine or duty by the ſuit of the party, as in a *decies tantum*. And ſo if in an action of Debt, the defendant deny his Deed, and it is found againſt him, he ſhall pay a fine to the King, but the Plaintiff ſhall be firſt ſatisfyed, 41 *E.* 3. 15. 4 *E.* 4. 16. 17 *E.* 3. 73 29 *E.* 3. 13.

The

The fourth Protection *cum clauſula volumus*, is when a man ſent into the King's ſervice beyond Sea, is impriſoned there, ſo as neither Protection, Profection or Moration will ſerve him, and this hath no certain time limited in it, *F. N. B.* 28. *c.*

Of Protections *cum clauſula nolumus*, that are of Grace, *vide lib.* 7. *fo.* 9. *Calvin's* Caſe, *Regiſt.* 2 So.

The Protection *cum clauſula nolumus*, that is of Right, is, That every Spiritual perſon may ſue a Protection for him and his goods, and for the Fermors of their lands, *&c.* that they ſhall not be taken by the King's Purveyor, nor their carriages or Chattels taken by other Miniſters of the King; Which Writ doth recite the Statute of 14 *E.* 3. F. *N. B.* 29, 30.

Albeit Queen *Eliz.* maintained many Wars, yet ſhe granted few or no Protections; and her reaſon was, That he was no fit Subject to be employed in her ſervice, that was ſubject to other mens actions, leſt She might be thought to delay Juſtice, *fol.* 131. b.

Sect. 200.

Un home que eſt enter profeſſe religion, eſt civiliter mortuus or *mortuus ſeculo.*

To three purpoſes, Profeſſion, *i. e.* the civil death, hath not the effect of a natural death: 1. this civil death ſhall never derogate from his own grant, nor be any mean to avoid it; for if tenant in tail make a Feoffment in fee, and enter into Religion, his iſſue ſhall have no *Formedon* during his life. 2. It ſhall never give her a vail, without whoſe conſent he could not have entred into Religion, and therefore his wife ſhall not be endowed untill his natural death. But if the wife, after her husband hath entred into Religion, alien the Land which is her own right, and after her husband is deraigned, the husband may enter, and avoid the alienation, 31 *E.* 1. *Dower* 176. 21 *E.* 4. 14. 3. It ſhall not work any prejudice to a ſtranger that hath a former right.

In

If a diſſeiſor is poſſeſſed, ſo as the lands deſcend to his heir, this deſcent ſhall not toll the entry of the diſſeiſee.

A woman cannot be profeſſed a Nun during the life of her husband, 5 *E.* 4. 3.

But if a man holdeth lands by Knights ſervice, and is profeſſed, *&c.* his heir within age, he ſhall be in Ward, 31 *E.* *Colluſion* 29.

If one joynt-tenant be profeſſed, *&c.* the land ſhall ſurvive to the other, 21 *R.* 2. *Judgment* 263.

An Abbot, *&c.* may ſue and be ſued, *&c.* for any thing that concerns the houſe of Religion, *Bract. fo.* 415.

A wife is diſabled to ſue without her husband, as much as a Monk is without his Sovereign, 4 *H.* 3. *Br.* 766.

And when the wife of Sir *Ro. Belknap* Juſtice of the Common Pleas, who was exiled beyond Sea, did ſue a Writ in her own name, without her husband, he being alive, whereof one ſaid, *Ecce modo mirum, quod fœmina fert breve Regi non nominando virum conjunctim robore legis*, 2 *H.* 4. *f.* 7. *a.* And King *E.* 3. brought a *qu. imp.* againſt the Lady of *Malnavers*, 10 *E.* 3. 53. And King *H.* 4. brought a Writ of Waſt againſt *Sibel B.* 1 *H.* 4. 1. b.

And *Tho.* of *Weyland* being abjured the Realm for Felony, in the year before, *Margery de Moſe* his wife, and *Richard* ſon of the ſaid *Tho.* exhibited their Petition of Right into the Parliament, *Anno.* 19 *E.* 1. for the Manor of *Sobbir*, wherein her husband had but an Eſtate for life joyntly with her, and the inheritance in *Richard* the ſon by fine.

The *Earl* of *Gloceſter* Lord of the fee (who claiming the land by Eſcheat, had taken the poſſeſſion thereof) alledged, *Quod non fuit jure conſonum quod aliqua fœmina intraret in aliquas terras vivente marito ſuo, &c. Tamen Coram Conſilio Domini R. vocat' Theſaurar' & Baron. & Juſticiariis de utroque Banco concordat' eſt, quod prædicta Margeria rehabeat talem ſeiſinam, &c. ſecundum perportum finis prædict' &c. Vide Lib. fo.* 33. *a.*

If the husband had aliened the land of his wife, and after had been abjured the Realm for Felony, the wife ſhall have

a *Cui*

Cui in vita in his life time, 31 *E.* 1. *Cui in vita*, 31. The wife of the King of *England* is of ability and capacity to grant and to take, to ſue and to be ſued, as a feme ſole by the Commonlaw. And ſuch a Queen hath many Prerogatives; as, ſhe ſhall find no pledges, for ſuch is his dignity, ſhe ſhall not be amerced, 18 *E.* 3. 1, *&* 2. The Queen ſhall pay no Toll, *F. N. B.* 235. The Writ of Right ſhall not be directed to the Queen, no more than to the King, but to her Bayliff, *F. N. B.* 1. *F.* But a Protection ſhall be allowed againſt the Queen, but not againſt the King; neither ſhall the Queen be ſhewed by Petition, but by a *Præcipe*, 21 *E.* 3. 3. 11 *H.* 4. 76. *b.*

If *A.* be bound to the Abbot of *D. A.* is profeſſed a Monk in the ſame Abbey, and after is made Abbot thereof, he ſhall have an action of Debt againſt his own Executors, 4 *E.* 4. 35. 6 *E.* 4. 4. 22 *H.* 6. 5. 45 *E.* 3. 10. *a.* 5 *H.* 7. 25. *b.*

Sect. 201.

Excommunicato interdicitur omnis actus legitimus, ita quod agere non poteſt, nec aliquem convenire, licet ipſe ab aliis poſſit conveniri. Excommunicatio nihil aliud eſt quam Cenſura à Canone vel judice eccleſiaſtico prolata & inflicta privans legitima Communione Sacramentorum & quandoque hominum, Bract. lib. 5. fo. 415. & 426, *&c.* F. N. B. 64 *F.*

None can certifie *Excommengment*, but onely the Biſhop, or one that hath Ordinary Juriſdiction, and is immediate Officer to the King's Courts. As the Archdeacon of *R.* or the Dean and Chapter in time of vacation.

The Commonlaw diſallows all acts done in diſability of any Subject of this Realm by any foreign power, as things not authentique, whereof the Judges ſhould give allowance, 16 *E.* 3. *Excom.* 4. *N. B.* 64.

For the manner of Election of Biſhops, *vide le ſtatute* of 25 *H.* 8.

None but the King's Court of Record, as the King's Bench, *&c.* Juſtices of Gaol-delivery, *&c.* can write to the Biſhop to certifie Baſtardy, Mulierty, loyalty of Matrimony, *&c.* for it is a rule in law, That none but the King can write

to

to the Biſhop to certifie. *Nullus alius præter Regem poteſt Epiſcopo demandare inquiſitionem faciendam*, Bract. l. 3. 106.

Jour. is the day of appearance of the parties, or continuance of the plea. And in all Summons upon the Original there be 15 days after the Summons before the appearance. But if the Original be returned *tarde*, and *Sommons alias* goeth forth, there be nine Returns between the Teſte and the Return, 8 *H.* 6. 20. 8 *Eliz. Dyer* 251.

And before the Statute of *Articuli ſuper Chart.* cap. 1. 28 E. 1. in all Summons and Attachments in plea of Land there ſhall be contained the term of 15 days. But by conſent other than common days may be taken, 11 *H.* 4. 23.

The uſe of the King's Bench at this day is, That if the offence be committed in another Countrey than where the Bench ſits, and the Indictment be removed by *Certiorari*, there muſt be 15 days between every Proceſs, and the Return thereof, *&c. Lib.* 9. 118. *Zanchers* Caſe, *fo.* 134. *b. &c.*

There is *dies ſpeciales*, as in an Aſſize in the King's Bench or Common Pleas, the Attachment need not be 15 days before the appearance. *F. N. B.* 177. cap.

The day of *Niſi prius*, and the day in bank, is all one as to pleading but not to other purpoſes, 21 *H.* 6. 10. *vide & qu.* fo. 135. a.

Reſummons or Reattachments, are Writs that the Demandant or Plaintiff, after he hath obtained the Letters of his Abſolution, may ſue out to bring the Tenant or Defendant again into Court, to have day to anſwer unto him; and theſe Writs do lie in all caſes when the plea is diſcontinued, or put without day, either in this caſe, or in caſe where the Demandant or Tenant hath his age, or for the *non venue* of the Juſtices, or in caſe of a protection or Eſſoign *de ſervice le Roy, &c.* Bracton, *lib.* 5. 425. Brit. *cap.* 7 4. *l.* 7. 29, 30.

Note, That in the caſe of *Excommengement*, the Writ ſhall not abate, but the Plea to be put without day, untill the Plaintiff purchaſe his Letters of Abſolution, *&c.* but in the other

other five caſes (*ſc.* of a Villain, *&c. ante fo.* 55. a.) the Writ ſhall abate, *fo.* 135. b.

But in the caſe of Outlawry the Writ ſhall abate if he obtain not his pardon. 44 *E.* 3. 27.

At this day Idiots, Madmen, *&c.* may ſue, for the Sutes muſt be in their name, but it ſhall be followed by others. An Idiot ſhall not appear by Guardian or *Prochein amy*, or Atturney, but he muſt be ever in perſon, 33 *H.* 6. 18. *F. N. B.* 27. *G.*

But an Infant or a minor ſhall ſue by *Prochein amy*, and defend by Guardian, 27 *H.* 8. 11. 20 *E.* 4. 2. *F. N. B.* 27 *H.*

Sect. 202, 203, 204.

Si lenfant al age de 14 *ans enter en religion, & eſt profeſſe, le gardein nad auer remedie (quant al gard le corps) forſque breve de raviſhment de gard envers le ſoveraigne del meaſon, & l'entry d' aſc. eſtant de pleine age que è heire lenfant ē congeable: & le gardein en tiel caſe nad aſc' remedie par le terre, &c. Manumittere idem eſt quod extra manum, vel extra poteſtatem alterius ponere.*

Every Manumiſſion is an infranchiſement, but every infranchiſement is not a Manumiſſion, *Mirr. cap.* 2. *Sect.* 18.

There be two kinds of Manumiſſions: 1. Expreſs, when the Villain by deed in expreſs words is manumiſſed and made free. 2. Implyed, by doing ſome act, that maketh in judgement of Law, the Villain free, *&c.*

Libertinum ingratum leges civiles in priſtinam redigunt ſervitutem, ſed leges Angliæ ſemel manumiſſum ſemper liberum judicant gratum & ingratum, Forteſcue, cap. 46. fol. 137. b.

There be ſome caſes where the Villain ſhall be privileged from the ſeiſure of the Lord, *&c.*

1. *Ratione loci*, as if a Villain in the ancient Demeſn of the King a year and a day, without claim or ſeiſure of the Lord, the Lord cannot ſeiſe him, *&c.* ſo long as he remains

and

and continues there, 39 *E.* 3. 6. b. *F. N. B.* 79.

2. *Ratione profeſſionis*, as if he a Monk be, *&c. Glanv. l.* cap. 5.

3. *Ratione dignitatis*, if he be made a Knight, *&c. Brit.* fo. 79.

4. *Ratione matrimonii*, as if a Neice marry a free-man, ſhe is privileged during the marriage, *&c.* but if the Lord himſelf marry the Neice, then ſhe is infranchiſed for ever, *Mich.* c. 3. ſect. 18. *acc. Doct. & Stu.* 141.

If a Neice be regardant to a Manor, and ſhe taketh a free-man to husband by licence of the Lord, and the Lord maketh a feoffment in fee of the Manor, the husband dyeth, the feoffor ſhall have the Neice, for that during the marriage ſhe was ſevered from the Manor,* and ſo is *lib.* 29 *Aſſ.* (which is falſly printed) to be underſtood.

If two Coparceners be of a Villain, and one of them taketh him to husband, ſhe and her husband ſhall not have a *Nuper obiit* againſt her Coparcener, but after the deceaſe of her husband ſhe ſhall, 16 *H.* 3. *Nuper ob.* 17.

When the Lord enableth the Villain to have an action againſt him as for Debt, or Annuity, *&c.* or if he ſue against his Villain an Action of Debt, Or of Covenant, *&c.* or giveth to the Villain a certain and fixed Eſtate in Land, *&c.* as a leaſe for years by Deed, or without Deed, this is an infranchiſement for ever. But if the Lord return to his Villain, *&c.* or if he releaſe all his right in black Acre, and the Villain is not thereof ſeiſed, this is no infranchiſement, becauſe it is void, and can give no cauſe of action, *fo.* 138. a. 11 *H.* 7. 13.

Sect. 208.

The Tenant infeoffs the Villain of the Lord, and a ſtranger* upon by Colluſion; in this caſe although the Lord may enter upon the Villain for the moity, yet may he have a Writ of Ward againſt them both, without infranchiſement of the Villain; for if the Lord ſhould enter upon the Villain, then ſhould the ſeigniory be ſuſpended, and then could

could he not have a Writ of Ward againſt the other, *vide &c.*

There is a Nonſute before appearance at the return of the Writ, or after appearance at ſome day of continuance.

A Nonſute is ever upon a demand made when the Demandant or Plaintiff ſhould appear, and he makes default.

A *Retraxit* is ever when the Demandant or Plaintiff is preſent in Court, *&c.* and this is either privative, as upon demand made, that he depart in deſpight of the Court having made default, *&c.* or Poſitive, as when he ſaith, that he will not proſecute his plea, *&c. ſed abinde omnino ſe retraxit, &c.* fol. 139. a. *

Alſo a *Retraxit* is a bar of all other actions of like or inferior nature; *qui ſemel actionem renunciavit amplius repetere non poteſt.* But Reg. a Nonſute is not ſo, but that he may commence an action of like nature, *&c.* again, *lib.* 8. *fo.* 58. *Becher's* Caſe.

But yet for ſome ſpecial reaſons. Nonſute in ſome actions is peremptory: as in a *qu. imp.* if the Plaintiff be Nonſure after appearance, the Defendant ſhall make a Title, and have a Writ to the Biſhop, *&c.* and the Incumbent that cometh in by that Writ ſhall never be removed, 5 *E.* 3. 35. *lib.* 7. *fo.* 27. b. Sir *Hugh Portman's* c. So it is in a Writ *de Nativo habendo in favorem libertatis*, 6 *E.* 2 *Vill.* 26. *F. N. B.* 78. c. And in an appeal of Murther, Rape, Robbery, *&c. in favorem vitæ*, 9 H. 4. 1. *Pl. Com.* 148. *a.* 171. And in an appeal of *Mayhem*, for the Writ ſaith, *Felonicè Mayhemavit*, 43 *Aſſ.* 39. And in Attaint; and the reaſon is, for the faith that the Law gives to the Verdict, and for the fearfull Judgment that ſhould be given againſt the firſt Jury, if they ſhould be convicted; and therefore upon the Nonſute the Plaintiff ſhall be impriſoned, and his pledges amerced; but if the Proceſs in an attaint be diſcontinued, the Plaintiff may have another Writ of Attaint, becauſe upon the Nonſute there is a Judgment given, but not upon the diſcontinuance, *F. N. B.* 108. d. 32 *Aſſ.* 13.

Nonſute

Nonſuit before appearance is not peremtory in any caſe for that a ſtranger may purchaſe a Writ in the name of him that cauſe of action hath.*

In real or mixt actions the Nonſuit of one Demandant is not the Nonſuit of both, but he that maketh default ſhall be ſummoned and ſevered, but Reg. in perſonal actions the Nonſuit of one is the Nonſuit of both, unleſs it be in certain particular caſes.* *F. N. B.* 35. b. as in perſonal actions brought by Executors, *&c. lib.** 6. *fo.* 25. *Ruddock's* Caſe. And in an *Aud. quær.* concerning the perſonalty* *vide & qu. lib. fa.* 139. *a.*

In a *quid Juris clamat*, the Nonſuit of the one, is the Nonſuit of both, becauſe the tenant cannot attorn according to the grant, 20 *E.* 3. *Severance* 17.

Some actions follow the nature of thoſe actions whereupon they are grounded, as the Writs of Errour, attaint, *Scire fac' &c.* If a real action be brought by ſeveral *Præcipe* againſt two or more, if the Defendant be Nonſuit againſt one, he is Nonſuit againſt all, for as to the Defendant it is but one Writ under one Teſte, 47 *E.* 3. 6. *b.*

Severance is twofold; *viz.* by Summons *ad ſequend' ſimul*, and that is when one of the Demandants or Plaintiffs never appeared, and by award of the Court of Nonſuit, without any Summons, and that is after appearance, *fo.* 149. b.

At the Common law upon every continuance or day given over, the Plaintiff might have been Nonſuit, and therefore after Verdict given, if the Court gave a day to be adviſed, at that day the Plaintiff was demandable, and therefore might have been Nonſuit, which is now remedied by the Statute of 2 *H.* 4. *cap.* 7. But after demur in law joyned, if the Court doth give a day over, at that day the Demandant or Plaintiff is Demand, and may be Nonſuit, for that is not holden by any Statute, 2 *H.* 5. 5. and after an award to account, the Plaintiff may be Nonſuit, and ſo note a diverſity between an interlocutory award of the Court, and a final Judgement, *l.* 11. *fo.* 39. 41. *Medcalf's* Caſe.

Albeit the Lord be Nonſuit, yet the infranchiſement

the villain doth remain, for that grew by the appearance the Writ. So it is if the Writ do abate.

Whereſoever the Lord giveth to the villain a juſt cauſe of tion, he is infranchiſed. *Kellaway.* 134.

But if the Lord ſue his vill. by appeal of Felony, where he s indicted of the ſame before, this ſhall not enfranchiſe villain, and although he be acquited upon the appeal, for ſhall recover no damages againſt his Lord. *W.*2. *c.*12. 22. *Ass.* 39. 14 *H.* 7. 2.

Sect. 204, and 210, *&c.*

None ought to pay fines for the marriage of their daughrs without licence of the Lord, *&c.* but villains of bloud, freemen holding in Villenage, 43 *E.* 3. 5.

Additio probat minoritatem. Hæreditas inter maſculos jure civili eſt dividenda, Fort. c. 40.

Haud facile emergunt quorum virtutibus obſtat
Res anguſta domi —— Horace.

By the Statute of 31 *H.* 8. a great part of *Kent* is made eſcendable to the eldeſt ſon. 18 *H.* 6. *c.* 1.

For { *In plures quoties rivos deducitur amnis*
Fit minor, ac, unda deficiente, perit.

Sect. 211, and 212.

There is a ſpecial kind of Borough of *Engl.* as it ſhall deend to the younger ſon, if he be not of the half bloud, and he be, then to the eldeſt ſon. 32 *E.*3. *tit.* age 81. within he Manor of *B.* in *Comit.* Berks, there is ſuch a cuſtome, that a man hath divers daughters, and no ſon, and dieth, the eldeſt daughter ſhall onely inherit, and if he have no daughers but ſiſters, the eldeſt ſiſter by the cuſtome ſhall inherit, nd ſometime the youngeſt. *M.*10 *Ja. Eliots c. Brit.* 187. *b.*

Hor. { *Imberbis juvenis tandem Cuſtode remoto,*
Gaudet equis, Canibuſque, & aprici gramine Campi,
Cereus in vitium flecti, monitoribus aſper,
Utilium tardus proviſor, prodigus æris,
Sublimis, cupiduſque & amatæ relinquere pernix.

Nil

Nil homine infirmum tellus animalia nutrit
Inter Cuncta magis ——— Home.

Aliquis non debet esse judex in propria causa. 10 E. 3. 2 H. 3. 4 H. 4. *Salop. Coram Rege.*

Præscription que est encounter reason, *ne doit est. al quia malus usus abolendus est. In consuetudinibus non d turnitas temporis, sed soliditas rationis considerandæ est.* 141. *a.*

Rex, &c. pro communi utilitate terræ Hibernia, & pri tate terrarum, provisum est quod omnes leges, &c. quæ in R Angl. tenentur, in Hibernia teneantur, &c. Sicut Joha Rex cum illic esset, statuit & firmiter mandavit, &c. Ro. 30 *H.* 3. *Vid. lib.* 141. b.

By an Act of Parliament tent. 10 *H.* 7. *est enact, que t stat, ft.* in England *devant cela temps ferront in force in Roy de* Ireland.

CHAP. XII.

Of Rents.

Sect. 213.

RENT service *est lou le* tenant *tient la terre de son Seig per* service and certain rent, *& le Seignior poit distr ceo de* common right. Rent is reserved out of the pro of the Land, and is not due till the Tenant or Lessee take t profits: for *reddere nihil aliud est quam acceptum aut aliqu partem ejusdem restituere; seu reddere est quasi retro dare. Lib.* 148. *Clun's* Case. *Pl. Com.* 138, 139, *Browning.* c.

A rent service cannot be reserved out of any inheritan but such as is manurable; whereinto the Lord may enter, a take a distress, as in Lands, *&c.* Reversions, Remainde and as some have said out of the herbage of Land, and r not out of any inheritance incorporeal, or that lie in gr

Lib. 5. *fo.* 4. *Seignior* Mountioyes *c. l.* 7. *f.* 23. *But's c. Pl. com.* 139. By Act of Law one rent or ſervice may iſſue out of another. 3 *H.* 6. 21. And though it be out of Lands, *&c.* Yet it muſt be out of an Eſtate that paſſeth by the conveyance, and not out of a right, 10 *E.* 4. 3. *b.* As if the diſſeiſee releaſe to the diſſeiſor of the Land, reſerving a rent, the reſerve is good, *Fo.* 144. a.

Non debet eſſe reſervatio de proficuis ipſis, quia ea conceduntur, ſed de redditu novo extra proficua, 38 *H.* 6. 38. *a. Fol.* 142. *a.*

The Commonlaw is the beſt and moſt common birth-righe that the ſubject hath for the ſafeguard of his Lands, *&c.* 2 *H.* 4. c. 1. Juſtice is the daughter of the Law, for the Law bringeth her forth.

A rent ſervice may be reſerved without Deed, 35 *H.* 6. 34.

Sect. 215, *&c.*

Ou home ſur undone en Tail *ou* leaſe, *&c. voile reſerv. a lu* rent ſervice, *il* covient que le reverſion, *&c. Soit en le donor ou leſſor, &c.* This is not to be underſtood onely of a reverſion immediately expectant upon the gift or Leaſe, for if a man make a gift in tail, the remainder in tail, reſerving a rent, and keep the reverſion in himſelf, this is a rent ſervice. *Fo.* 142. *b.*

Reſerver, ſometimes hath the force of ſaving or except. ſo as ſometimes it ſerveth to reſerve a new thing, *viz.* a rent. 8 *E.* 4. 48. Sometimes to except part of the thing *in eſſe* that is granted. 35 *H.* 6. 34. In the grant of a reverſion, the rent may be excepted, but not the ſervices. If a man make a gift in tail, without any reſervation, the donee ſhall hold of the donor by the ſame ſervices that be held over. The Law regardeth equity and equality without any proviſion or reſervation on the party, *B. f.* 10[illegible]. *Ipſæ etenim leges cupiunt ut jure regantur.*

But if the leſſor for life or years reſerveth nothing, he ſhall have fealty onely, which is an incident inſeparable to the reverſion. 38 *E.* 3. 7. *Littl. fo.* 4.

Sect. 217, and 218.

Rent muſt be reſerved to him from whom the ſtate of the Land moveth, and not to a ſtranger, 18 *E.* 2. *Aſſ.* 381. But ſome do hold that otherwiſe it is in the caſe of the King, 35 *H.* 6. 36*

Note, that upon a reſervation of a rent upon a feoffment in Fee by Deed Indenture, the feoffor ſhall not have a Writ of annuity, becauſe the words of reſervation, as *Reddendo*, &c. are the words of the Feoffor, and not of the Feoffee, albeit the Feoffee by acceptance of the State is bound thereby, 33 *E.* 3. Annuity 52. 1 *H.* 4. 5.

And it is holden, that a reſervation upon a Feoffment in Fee made by Deed Poll, is good, 8 *E.* 4. 8.

Auxi ſi un home Sēi. de cert. terre grant per unſt. Poll ou per Indenture un annual rent iſſuant hors de m. la terre a un auter in Fee, *ou* in Fee taile, *ou per terme de vie*, &c. *oveſque clauſe de diſtreſſe*, &c *donques ceo eſt* rent charge, *& ſi le grant ſoit ſans clauſe de diſtreſs donques il eſt r. ſeck* i. e. *redditus ſiccus.*

Alſo a man may have a rent by preſcription, 19 *E.* 3. Title 34.

Sect. 219.

If a man grant by his Deed a rent charge to another, and the rent is behind, the grantee hath election to bring a Writ of annuity,* and charging the perſon onely, &c. or to diſtrain upon the Land, and to make it real,* and charging the perſon onely, to make it perſonal. Put caſe that *A.* be ſeiſed of Lands in fee, and he and *B.* grant a rent charge to one in fee, this *prima facie* is the grant of *A.* and the confirming of *B.* but yet the grantee may have a Writ of Annuity againſt both. Two men grant an Annuity of 20 l. *per an.* to another although the perſons be ſeveral, yet he ſhall have but one Annuity: But if the grant be, *Obligam. nos, & utrumque noſtrum* The grantee may have a Writ of Annuity againſt *B.* either of them, but he ſhall have but one ſatisfaction, 16 *E.* 2. tit. An-

nuity

nuity 47. If a rent charge be granted to a man and his heirs, he ſhall not have a Writ of Annuity againſt the heir of the grantor, albeit he hath Aſſets, unleſs the grant be for him and his heirs. 2 *H.* 4. 13. *Dyer* 17 *Eliz.* 344. *b. Vide, &c. Fo.* 144. *b.*

But *Littl.* is to be underſtood with ſome limitation: for of a rent granted for owelty of partition, a Writ of Annuity doth not lie, becauſe it is of the nature of the Land deſcended. Alſo of ſuch a rent as may be granted without Deed a Writ of Annuity doth not lie, though it be granted by Deed. 29 *Aſſ.* p. 23.

Note, as to Elections, theſe diverſities following.

1. When nothing paſſeth to the Feoffee or Grantee before election, *&c.* There the election ought to be made in the life of the parties, *&c.* But when an Eſtate or intereſt paſſes immediately to the Feoffee, Donee, or Grantee, there the Election may be made by them, or by their heirs, or executors, *Lib.* 2. *fo.* 36. *&c.* Sir *Row. Hayward's* c.

2. When one and the ſame thing paſſeth, *&c.* and the Donee, or Grantee hath election, in what manner or degree he will take this, there the intereſt paſſeth immediately, and the party, his heirs or executors may make election when they will.

3 When election is given to ſeveral perſons, there the firſt Election made by any of the perſons ſhall ſtand.

4 In caſe an election be given of two ſeveral things, alwaies he which is the firſt agent, and ought to doe the firſt Act, ſhall have the election. 2 *H.* 7. 23. *a.*

When the granted is of things Annual, and are to have continuance, there the election remaineth to the grantor (in caſe where the Law giveth to him election) as well after the day as before; otherwiſe it is when the things are to be performed *unica vice*, 9 *E.* 4. 36. and 13 *E.* 4. Grantee for life, *&c.* ought to bring his Writ of Annuity in the disjunctive, elſe the Judgment, *&c.* ſhall determine his election for ever: herein *Fitzh.* is miſtaken.

6. The Feoffee by his act and wrong may loſe his election

and give the ſame to the Feoffer: as if one infeoff another of two acres, to have and to hold, the one for life, and the other in tail, and he before election make a Feoffment of both, in this caſe the Feoffer ſhall have election to enter into which of them he will, *&c.*

Note that this determination of the election of the grantee muſt be by action or ſute in Court of Record. If the grantee doth bring a Writ of annuity, and at the return thereof appear and account, this is a determination of his election in Court or Record, albeit he never proceedeth any further. *F.N.B.* 152. *a.* 5 *H.*7. 33. b. So if the grantee bring an Aſſ. for the rent, and make his plaint, he ſhall never after bring a Writ of annuity. 10 *E.* 4. 17.

For an Advowry in Court of Record, which is in nature of an action, is a determination of his election before any judgment given. *F.* 145. b.

It is a general rule, that the plaintiff muſt have the property of the goods in him at the time of the taking. 3 *E.* 3. 74. 6*H.*4. 2. But yet if the goods of a villain be diſtrained, the Lord of the villain ſhall have a Replevy, becauſe the bringing of a Replevy amounts to a claim in Law, and veſts the property in the plaintiff. But in that caſe if the goods of a villain be taken by a trns. the Lord ſhall have no Replevy, becauſe the villain had but a right. 33 *E.* 3. *Repl.* 49 *F. N. B.* 69. *F.*

Property ought to be tryed by Writ. 30 *E.* 3. 22.

A man cannot claim property by his Bailiff or ſervant, for that, if the claim fall out to be falſe, he ſhall be fined for his contempt, which the Lord cannot be unleſs he maketh claim himſelf, for *nemo punitur pro alieno delicto.* 5 E. 3. 38. 11 *H.* 4. 4. *fo.* 145. *b.*

In a ſpecial caſe a man may have a Replevy of goods not diſtrained, as if the Meſner put in his cattel in lieu of the cattel of the tenant peravail, that he is bound to acquit, he ſhall have a Replevy, *&c.* 34 *H.* 6. 47.

It is againſt the nature of a diſtreſs taken, *&c.* to be irreplevisable. 31 *E.* 3. *Gage Deliñ.* 5. And *Bract. Lib.* 4. *fo.* 133. *a.* and

nd *b.* Saith, *Eadem modo de via obſtructa per breve quod juſti-iet propter cœm utilitatem, ne tranſeuntes ire diu impediantur, uia hoc eſſet commune damnum, & in hoc Vicecomes & Juſtici-arii faciant ſicut ſuper detenſionem averior. contra vadium. ple-ii propter commune utilit. ne animalia diu incluſa pereant.*

If the beaſts of divers ſeveral men be taken, they cannot joyn in a Repleg. but every one muſt have a ſeveral Repl. and ſo in a Repleg. it is a good plea, to ſay that the property is to the Plaintiff, and to a ſtranger, and where there be two Plaintiffs, that the property is to one of them. 28 *E.* 3. 92. 2 *E.* 4. 23.

Electio ſemel facta, & placitum ceſtatum ō patitur regreſſum Quod ſemel in electionibus placuit amplius diſplicere non poteſt.

Note, a diverſity between the caſe (**fo.* 65. *a.*) aforeſaid of the grant of the rent, where he may take it either real or perſonal, and when a man may have election to have ſeveral remedies for a thing that is meerly perſonal, or meerly real from the beginning. As if a man may have an action af account, or an action of debt at his pleaſure, and he bringeth an action of account, and appear to it, and after it Nonſuit, yet may he have an action of debt afterwards, becauſe both actions charge the perſon, So it is of an Aſſ. and of a Writ of entry in the nature of an Aſſ. *&c.* 28 *E.* 3. 98. b. 27 *E.* 3. 89. b. *Fo.* 146. *a.*

Sect. 220.

By this Section it appeareth, that when in a general grant, the law doth give two remedies, that the grantor may provide, that the grantee ſhall not uſe one of them, and leave the party to the other. But where the grantee hath but one remedy, that remedy cannot be barred by any proviſo, for ſuch a proviſo ſhould be repugnant to the grant. 28 *H.* 8. *Dyer.* 9. *b.*

And if a man by his Deed grant a rent Charge out of land provid. that it ſhall not charge the land, albeit the grantee hath a double remedy, yet the proviſo is repugnant, becauſe the Land is expreſly charged with the rent, but the Writ of

Annuity is but implyed in the grant, and therefore that may be reſtrained without any repugnant, and ſufficient remedy left for the grantee; for which cauſe *Littleton* putteth his caſe of reſtraint of bringing a Writ of Annuity. Alſo our Authour putteth his caſe of a rent charge continuing, and of a rent charge iſſuing truly out of Land, 9 *H.* 11. 53. 11 *H.* 8. *&c. mala grammatica non vitiat cartam.* For the Law that principally reſpecteth ſubſtance, doth judge ſometimes a double negative, to be a negative, according to the intent of the parties, and not according to grammatical conſtruction.

Sect. 221.

A. grants that *B.* ſhall diſtrein for ſuch a yearly ſum of money in his Manor of *D.* in judgment of Law the Manor is charged with the rent, but the perſon of the grantor cannot be charged, becauſe he expreſly granteth no rent, * for that would charge his perſon, but that the grantee ſhould diſtrein, *&c.* which onely chargeth the Land. *Fo.* 146. b.

If a rent be granted out of the Manor of *D.* and the grantor grant over, That if the rent be behind, the grantee ſhall diſtrein, *&c.* in the Manor of *S.* this is but a penalty in the Manor of *S.* But both Manors are charged, the one with the rent, the other with the diſtreſs for the rent, the one iſſuing out of the land, and the other to be taken upon the land, *lib.* 7. *fo.* 23. *&c.* in *But's* Caſe.

Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.

And if in this caſe, this ſhall amount to the grant of a rent out of the Manor of *S.* then the grantor ſhall be twice charged; and ſo the Law by conſtruction againſt the words, and the intention of the parties, ſhall doe injury to the grantor, *&c. fo.* 147. a.

And there is no diverſity in this caſe, when the Manor of *S.* lyeth in the ſame county, and when it lyeth in another county, for the words in both caſes are all one, and there is no

no reaſon to ſay that he ſhall fail of Recovery by Aſſize, *lib. 7. f. 3. Bulwar's* Caſe, 1. *Aſſ. p.* 10. *Vide, &c.*

If a man grant a rent out of three acres, and grant over, that if the rent be behind, that he ſhall reſtrein, *&c.* in one of the acres, this rent is entire, and cannot be a rent ſeck out of two acres, and a rent charge out of the third acre; and therefore it is a rent ſeck for the whole, and yet he ſhall diſtrain for this in the third acre, *Vide, & qu.*

A. doth bargain and ſell Land to *B.* by Indenture, and before Inrolment they both grant a rent charge by Deed to *C.* and after the Indenture is inroled; by the operation of the Statute, it ſhall be the grant of *B.* and the confirmation of *A.* But if the Deed had not been inrolled, it had been the grant of *A.* and the confirmation of *B.* and ſo *quacunque via data* the grant is good.

Home ſeiſe de 20 *acr. grant rent* 20 *s. hors de cheſe. acre. &c. le grantee aña.* 20 *l.* 22 *H.* 6. 10. *b.*

Sect. 222, *&c.*

Si home ad un rent charge a luy & a ſes heires iſſuant hors de cert' terre, ſil purchaſe aſc' parcel de cel a luy, & aſes heires, tout le rent charge eſt extinct, & l' annuity auxi, pur ceo que rent charge ne port eſtr. per tiel Manor apportion, mes ſi tiel parcel diſcend, &c. (S. 221.*) a le fits, auterment eſt. Auxi per purchaſe de parcel, &c. rent ſervice point eſtre apportion.*

A rent charge by the Act of the party may in ſome caſe be apportioned: As if a man hath a rent charge of 20 *s.* he may releaſe to the tenant of the land 10 *s.* and reſerve part, for the grantee dealeth not with the land, as in caſe of purchaſe, *Hill.* 14 *Eliz. in Communi Banco* F. N. B. 152. *d. e.*

If tenant *pur auter vie*, by his Deed grant a rent charge to one for 21 years, *Ceſty que vie* dyeth, the rent charge is determined, and yet the grantee may have during the years a Writ of Annuity for the arrerages incur after the death of *Ceſty que vie*, becauſe the rent charge did determine by the act of God, and by the courſe of Law, *Actus legis*

nulli facit injuriam. Wards cited in lib. 2. In *Heyward's* Case *fo.* 36.

There be divers kinds of rent ſervices which are not within the Statute of *Quia empt. terræ*, and yet ſuch rent ſervices are apportionable by the Commonlaw. As if the Leſſor recover part of the land, *&c.* in an action of waſte, or enter for a forfeiture in part, *&c. Lib.* 6. *f* 1 *&c. Bruerton.c. Lib.* 8. *fo.* 105 *&c. Talbot's* Caſe. So likewiſe if the leſſor grant part of the reverſion to a ſtranger, the rent ſhall be apportioned, for the rent is incident to the reverſion. *Lib.* 8. *fo.* 79. *Wilde's* Caſe.

A rent ſervice may be extinct for part, and apportioned for the reſt, but a rent ſervice cannot be ſuſpended in part by act of the party, and *in eſſe* for other part.

For if the leſſor deſſeiſe the leſſee, the rent is ſuſpended for the whole, and cannot be apportioned for any part. But otherwiſe it is where the leſſor enters Lawfully, as upon a ſurrender, forfeiture, *&c.* Where the rent is lawfully extinct in part. 21 *E.* 4. 29.

And yet by act in Law a rent ſervice may be ſuſpended in part, and *in eſſe* for part. As if the tenant give a part of the tenancy to the Father of the Lord, in tail, the Father dieth, and this deſcends to the Lord, in this caſe by act in Law the Seigniory is ſuſpended in part and *in eſſe* for part, and the ſame Law is of a rent charge. 30 *Aſſ. p.* 12.

And when the Guardian in chivalry entreth into the Land of his ward within age, now is the Seigniory ſuſpended: but if the wife of the tenant be endowed, *&c.* Now ſhall ſhe pay to the Lord, the third part of the rent, 33 *E.* 3. *Dower* 138. this caſe I ſhould have put firſt *Tho. More.*

Item, a Seigniory may be ſuſpended in part by the act of a ſtranger, as if two joyntenants or coperceners be of a Seigniory, and one of them diſſeiſe the tenant of the land, the other jointenant or copercener ſhall diſtrain for his or her moity. 27 *E.* 3. 88.

Concerning the apportionment of rents there is a difference between a grant of a rent, and a reſervation of rent. 22 *H.* 4. 17. A man againſt his own grant ſhall not take advantage

vantage of the weakneſs of his own Eſtate in part. *vide lib. &c. Fo.* 148. 6.

And note a diverſity between a rent in groſs, and a rent incident to a reverſion.

If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres againſt the grantor by a Title Paramount, the whole rent ſhall iſſue out of the other acre: But if the Recovery be by a feint Title by Covine, then the rent is extinct in the whole, becauſe he claimeth under the grantor, *Doct. & Stud.* l. 2. c. 17.

And yet in ſome caſes a rent charge ſhall not be wholly extinct, where the grantee claimeth from and under the grantor. As if *B.* make a leaſe of one acre for life to *A* and *A.* is ſeiſed of another acre in fee; *A.* granteth a rent-charge to *B.* out of both acres: and doth waſte in the acre which he holdeth for life, *B.* recovers in waſte, the whole rent is not extinct, but ſhall be apportioned, *&c.* for that, *Nullus Commodum capere poteſt de injuria ſua propria.*

If the King give two acres of Land of equal value to * another in fee, fee tail, for life or for years, reſerving a rent of Two ſhillings, and the one acre is evicted by a Title Paramount, the rent ſhall be proportioned, *F. N. B.* 234. b.

If an entire ſervice be *pro bono publico*, as Knights ſervice Caſtlegard, *&c.* though the Lord purchaſe part, the ſervice remains: but when entire ſervices are for the private benefit of the Lord, it is otherwiſe, *lib. 6. fo.* 1, 2. *Bruerton's* Caſe. *Sed vide lib. &c. fo.* 149. *a.*

Sect. 223, and 224.

Reg. it holdeth, That *quæ in partes dividi nequeunt, ſolida à ſingulis præſtantur, Vide los reports* Bruerton's *Caſe*, lib. 6. *Talbot's* Caſe, *l.* 8. *f.* 104.

If there be Lord and Tenant by Fealty and Heriot ſervice, and the Lord purchaſe part of the Land, the Herrriot ſervice is extinct, and yet it is not annual, becauſe it is entire and valuable. But otherwiſe it is of Herriot Cuſtome, *fo.* 149. *b.*

If the tenant giveth to the father of the grantee of a rent charge part of the rent in tail, and this deſcend to the grantee, the rent charge ſhall be apportioned, and ſo by act in law a rent charge may be ſuſpended for one part, and in *eſſe* for another. 30 *Aſſ.* p. 12. *fol.* 149. b.

And ſo it is if the father be grantee of a rent, and the ſon purchaſe part of the land charged, the father dyeth, and the rent deſcends to the ſon, the rent ſhall be apportioned: and ſo it is if the grantee grant the rent to the tenant of the land, and to a ſtranger, the rent is extinct but for a moity 34 *H.* 6. 41. b.

If a man hath iſſue two daughters, and grant a rent Charge to one of them out of his land, and dieth, the rent ſhall be apportioned; and if the grantee in this caſe infeoffeth another of her part of the land, yet the moity of the rent remaineth iſſuing out of her Siſters part, becauſe the part of the grantee in the land by the deſcent, was diſcharged of the rent.

But in all theſe caſes where the rent charge is apportioned by Act in Law, yet the Writ or Annuity faileth; for if the grantee ſhould bring a Writ of Annuity, he muſt ground it upon the grant by Deed, and then muſt he bring it for the whole, 9 *Aſſ.* 22. 5 *R.* 2. Annuity 21.

Annua nec debitum judex non ſeparat ipſum.

Alſo in reſpect of reality, the rent is apportioned, but the perſonality is indiviſible, *&c.*

If Execution be ſued, *&c.* upon a Statute Merchant or Staple, and after the inheritance of part of thoſe lands deſcend to the Conuſee, all the Execution is avoided, for the duty is Perſonal, and cannot be divided by act in Law, *Pl. Com.* 72. 15 *E.* 4, 5.

If the father within age purchaſe part of the land charged, and alieneth within age, and dyeth, the Son recovereth in a Writ, *Dum fuit infra ætat.* or entreth; in this Caſe the act of the Law is mixt with the act of the party, and yet the rent ſhall be apportioned; for after the recovery or entry, the Son hath the land by deſcent, *fo.* 150. *vide, &c.*

A re-

A relation or fiction of Law ſhall never work a wrong, or charge to a third perſon, but *in fictione juris ſemper eſt æquitas. lib.* 3. *fo.* 29. *Butler* and *Baker*'s Caſe.

As if the Feoffee grant a rent charge, *al feoffor & ſon feme & al heires del Baron' feme recover Dower; le rent charge ſerra apportion' & el diſtreinan, &c.*

Sect. 225.

If there be Lord and Tenant by Fealty and Rent, and the Lord by his Deed reciting the Tenure, releaſe all is Right in the Land, ſaving the ſaid rent; the ſeigniory remains, and he ſhall have the rent as a rent ſervice, and the fealty incident to it, *&c.* 12 *E.* 4. 11. 9 *E.* 3. 1.

If the Donee hold of the Donor by fealty and certain rent, and the Donor grant the ſervices to another, and the tenant attorn, the rent ſhall paſs as rent ſeck, *fol.* 150. b.

If there be Lord and Tenant by fealty and certain rent, and the Lord grant the rent in tail, or for life, ſaving the fealty; and further grant, That the grantee may diſtrain for it, albeit the reverſion of the rent be a rent ſervice, yet the Donee or Grantee ſhall have it but as a rent ſeck, and ſhall not diſtrain for it. 7 *E.* 3. 2, 3. *adjudg.*

Whereas in an Aſſize for a rent ſervice, all the tenants of the land need not be named, but ſuch as did the diſſeiſin; yet in Aſſize in the rent ſeck, which ſometimes was a rent ſervice, all the tenants muſt be named, as in caſe of a rent charge, albeit he was diſſeiſed but by one ſole tenant, 4 *E.* 2. *Aſſ.* 449. 26 *H.* 8. *Dyer* 31.

But if the Lord of a Manor releaſe the Fealty to his Tenant, ſaving the rent; or that a Meſnalty become a rent by Surpluſage, thoſe that are now ſeck (and ſometimes were ſervice) are part of the Manor; but a rent charge cannot be part of a Manor, 31 *Aſſ.* 23. 22 *Aſſ.* 53.

Sect. 226, *&c.*

If there be Lord and Tenant by Fealty and Rent, the

annual rent, which is a profitable ſervice, is of higher and more reſpect in Law, than the fealty, and therefore by the grant of the rent, the Fealty ſhall paſs as incident, *&c.* but it is an incident ſeparable, and therefore may be by a ſaving, as *Littleton* hath ſaid, ſeparated by it. And ſo when the Tenure is by Fealty and rent, and the rent be recovered, the Fealty ſhall incluſedly be recovered, 44 *E.* 3. 19. 26 *Aſſ.* 38. 8 *E.* 4. 28.

So long as Homage continues, the Fealty cannot be divided from it, *vide lib. &c.* 151. a.

Note a diverſity betwen theſe corporeal ſervices of Homage, Fealty and Eſcuage, which cannot become ſeck or dry, but make Tenure, whereunto Diſtreſſes, Eſcheats, and other Profits be incident; and other corporeal ſervices, as to Plough, Repair, Attend, *&c.* And all Rents whatſoever, for they may become ſeck, and make no Tenure.

Rent and Fealty are incident to the Reverſion, *viz.* Rent ſeparably, and Fealty inſeparably, 12 *E.* 4. 3. *Doct. & Stud. lib.* 2. *c.* 9.

The incident ſhall paſs by the grant of the Principal, but not *è converſo. Acceſſorium non ducit ſed ſequitur ſuum principale.* fo. 152. a.

If the Tenant inſeoff the Lord Paramount, and his wife, and their heirs, in this caſe the Meſnalty is but ſuſpended; for if the wife ſurvive, both Meſnalty and Seigniory are revived, 7 *Aſſ.* 2. 7 *E.* 3. 20.

It is ſaid, that if there be Lord Meſne and Tenant, each of them by Fealty and 6 d. the Lord confirm the ſtate of the Tenant to hold of him by Fealty and 3 d. that the Meſnalty is extinct. So it is if the Lord releaſe to the Tenant; for whether the Lord purchaſe the Tenancy, or the Tenant the Seigniory, the Meſnalty is extinct, 8 *H.* 6. 24. *Jo.* 152. b.

So if there be Lord and Tenant, and the Tenant make a gift in tail, the remainder to the King, the ſeigniory is extinct, 4 *&* 5 *P. & M. Dyer* 154. *Lex citius tolerare vult pri-*

rivatum damnum quam publicum malum, 13 H. 4. 3. 40 *Aſſ.* . 27.

No man can hold one and the ſame land immediately of two veral Lords. And one man cannot of the ſame Land be both ord and Tenant.

It is Reg. true, *Res inter alios acta alteri nocere non debet. t factum unius alteri nocere non debet*; which are true, with his Exception, unleſs an inconvenience ſhould follow, *&c.*

Quando lex aliquid alicui concedit, concedere videtur & id ine quo res ipſa eſſe non poteſt: And therefore if a man maketh leaſe for life, reſerving a rent, and bind himſelf in a Statute, and the Cogniſee hath the rent extended, and delivered o him, he ſhall diſtrain for the rent, becauſe he cometh to t by courſe of Law, 13 *H.* 4. Avowry 237.

La ley voet plus toſt ſuffer un miſchiefe que un inconvenience; *& pur ceo ſi Meſne tient per* 12 d. *& tenant per* 5 s. *& le ſeignieur purchaſe le tenancy le ſeigniory del Meſnaliy ẽ extinct Et le meſne aũa* 4 s. *come rent ſeck de le ſeignieur.*

Sect. 233.

Si home que ad rent ſeck eſt un foit ſei, d' aſc' parcel de le rent, & apurs le tenant ne voile payer le rent aver, il aũa aſſ. de novel diſſ.

A rent ſeck or rent charge may be demanded after it is behind at any time, *&c.* for, Remedies for rights are ever favourably expounded, *M.* 41 *E.* 4. adjudged.

If the demand be made upon the land, and the rent is not paid, whether the tenant be preſent or abſent, yet this is a denial in Law, *&c.*

Diſſeiſina, is a putting out of a man out of ſeiſin, and ever implieth a wrong. But diſpoſſeſſing or ejectment is a putting out of poſſeſſion, and may be right or by wrong, *Bract.* l. 4. *f.* 161. *Marr. c.* 2. *f.*

Diſſeiſin eſt un perſonal treſpaſs de tortius ouſter del ſeiſin.

Where the Statute of *Merton* (20 *H.* 3.) ſaith, *Diſſeiſitus* de

de libero tenemento. *Littleton* expounds it to extend to a re
ſeck or rent charge, albeit they be againſt common righ
yet a man hath a Freehold in them, 40 *Aſſ.* 23. *ac.*

And he that granteth *omnia tenementa ſua*, a rent charge
a rent ſeck, doth paſs, 14 *E.* 4. 4. 11 *H.* 6. 22.

Recuperare, i. *ad rem per injuriam extort' ſive detentam*
ſententiam Judicis reſtitui.

Execution is the obtaining of actual poſſeſſion of a
thing acquitted by Judgment of Law, or by a Fine executo
levied, whether it be by Sheriff, or by the entry of the par
vide Sect. 504.

If the Recovery in Aſſize, *&c.* be had againſt one, and h
and another rediſſeiſe the Plaintiff, he ſhall not have a Redi
ſeiſin; for he is *alius*, and he cannot have a Rediſſeiſin a
gainſt the former diſſeiſor alone, becauſe he is joynt-tenan
with another. For joynt-tenancy in a Writ of Rediſſeiſin, i
a good plea, and a ſtranger ſhall not be ſubject to double im
priſonment and double damages, 33 *E.* 3. *Rediſſeiſin* 9
9 *H.* 4. 5. *F. N. B.* 118. e.

A Rediſſeiſin doth lie againſt the diſſeiſor which doth redi
ſeiſe, and his Feoffee after the ſecond diſſeiſin, for otherwi
the rediſſeiſor might prevent the Plaintiff of his rediſſeiſin.

If the Meſne recovereth a rent when it is a rent ſervice,
and after the rent becometh a rent ſeck by ſurpluſage, and
doth rediſſeiſe him of the rent, he ſhall have a rediſſeiſin;
for the ſubſtance of the rent remains, though the quality be
altered.

Sect. 234.

He that is of a Jury, muſt be *liber & legalis homo.* 9 *E.* 4. 16.
Firſt he ought to be dwelling moſt near to the place where
the queſtion is moved. 2. He ought to be moſt ſufficient both
for underſtanding and competency of Eſtate. 3. To be leaſt
ſuſpicious, that is, to be indifferent as he ſtands unſworn.
Vide S. 102. 193. *Ad queſtionem facti non reſpondent Indi-*
ces. *Ad queſt. juris non reſpondent juratores.* *Calumniare* to
chal-

challenge, *i. e.* to except againſt them in Court that are returned to be *Jurors*. Fo. 155. b.

It is moſt neceſſary, that *Jurors* be *omni exceptione majores*; foraſmuch as mens lives, *&c.* are to be tried by them.

Nota, that there is a principal cauſe of challenge to the array, and a challenge to the favour, *Fol.* 156. *a. Vide & nota.*

The challenge to the array is in reſpect to the cauſe of undifferency or default in the Sheriff, or other officer that made the return, and not in reſpect of the perſons returned, where there is no default in the Sheriff, *&c.* for if the challenge to the array, be found againſt the party that takes it, yet he *ſhall* have his particular challenge to the Polls, that is to the particular perſons; and theſe be of four kinds, *i. e.* peremptory, principal, which induce favour, and for default of hundredors, *fo.* 156. b.

A man may challenge peremptorily, without ſhewing any cauſe, and this onely is in caſe of Felony, *&c. In favorem vitæ. Vide, &c.*

Principal challenges to the Poll may be reduced to four heads. 1. *Propter honoris reſpectum*, as no Peer of the Realm is to be ſworn on Juries, *l.* 6. 52.

2. *Propter defectum, patriæ, libertatis, liberi tenementi; Hundredorum*, for *vicini vicinorum facta præſumuntur ſcire.*

3. *Propter affectum*; and this is either working a principal challenge, or to the favour, and again a principal challenge is either by judgment of Law without any act of his, as if the Juror be of bloud or kindred to either party. *Brit. f.* 135. if the Juror have part of the Land that dependeth upon the ſame title, *Bract. fo.* 18.

If a witneſs named in the Deed be returned of the Jury, *&c. f.* 23. *Aſſ.* 11. *Fo.* 157. *a. Vide & nota.* Or upon his own act, as if the Juror had given a verdict before, for the ſame cauſe, albeit it be reverſed by Writ of error, or if after verdict Judgment were arreſted. So if he hath given a former verdict upon the ſame title or matter though between other perſons, 8 *H.* 5. 10. 18 *E.* 4. 12. 21 *E.* 4. 74. *fo.* 157. *b. Vide, &c.*

If a Juror hath been an arbitrator choſen by the plaintiff

or

or defendant in the ſame cauſe and have been informed of or treated of the matter, this is a principal challenge. 9 *E.* 4. 46. But a Commiſſioner choſen by one of the parties for examination of witneſſes, *&c.* may upon cauſe be challenged for favour. *l.* 9. *fo.* 71. *Peacock's* Caſe.

Challenge concluding to the favour muſt be left to the conſcience of the triers, *&c.* As if the Juror be of kindred, or under the diſtreſs of him in the reverſion or remainder, or in whoſe right the Avowry or juſtification is made, *&c.*

Theſe be no principal challenges, becauſe he in reverſion, *&c.* is not party to the Record, otherwiſe it is if they were made parties by Aid, Reſcepit, or Voucher, and yet the cauſe of favour is apparent; ſo it is of all principal cauſes if they were party to the Record. 10 *E. a.* 12. *vide, &c.*

4. *Propter delictum*, as if the Juror be attainted or convicted of treaſon or felony, *&c.* for *repellitur à ſacramento infamis.* So it is if a man be outlawed in treſpaſs, *&c. Mir. cap.* 3. *d' attaint. Fol.* 158. *a. Vide, &c.*

Nota, The array of the Tales ſhall not be challenged by any one party, untill the array of the principal be tried; but if the plaintiff challenge the array of the principal, the defendant may challenge the array of the Tales, (and there the one of the Principal, and the other of the Tales, ſhall try both arrays) after one hath taken a challenge to the Poll, he cannot challenge the array. 9 *E.* 4. 27. 9 *H.* 5. 11.

If a pannel upon a *ven. fac.* be returned, and a Tales; and the array of the principal is challenged, the Triers which try and quaſh the array, ſhall not try the array of the Tales; for now it is as if there had been no appearance of the principal pannel; but if the Triers affirm the array of the principal, then they ſhall try the array of the Tales. 9 *E.* 4. 46. 7 *E.* 6. *Dyer.* 78. When any challenge is made to the Polls, two triers ſhall be appointed by the Court, and if they try one indifferent, and he be ſworn, then he and the two Triers ſhall try another, and if another be tried indifferent, and he be ſworn, then the two triers ceaſe, and the two that be ſworn in the Jury ſhall try the reſt. 22 *E.* 4. *Chal.* 61, 62.

If

If the Plaintiff challenge ten, and the defendant one, and the twelfth is ſworn, becauſe one cannot try alone, there ſhall be added unto him one challenged by the plaintiff, and the other by the defendant. 7 *H.* 4. 41. If the cauſe of challenge touch the diſhonour or diſcredit of the Juror, he ſhall not be examined upon his oath, but in other caſes he ſhall be examined upon his oath to inform the Triers. 49 *E.* 4. 1, 2.

Fems ne ſerfs, ne enfans, ne nul infamys, ne nul que në file tenant, ne poet eſter. bone ſummonere. Brit. ca. 121. *Vide libr. Fo.* 158. *b.*

Of an Aſſ. of no *diſſeim*, *Vide l.* 8. *fo.* 45. *Jehu Webb*'s Caſe.

Whenſoever a Statute giveth a forfeiture or penalty againſt him which wrongfully detaineth, or diſpoſſeſſeth another of his duty or intereſt, in that caſe he that hath the wrong ſhall have the forfeiture, *&c.* and not the King. *P.* 29 *Eliz.* between the Queen and Wood, and ſo it was adjudged, *&c. M.* 4. *Ia. Re.* and note, that the Act of Parliament doth give a temporal remedy at the Commonlaw to Parſons, *&c.* for an eccleſiaſtical duty, and to lay-men proprietaries of tithes the like remedy, but they have election either to ſue for the treble value at the Commonlaw, or for the double value in the Eccleſiaſtical Court, or for ſubtraction of tithes there alſo. *Vide & nota* 159. *a. &c.* 2 *E.* 6. *ca.* 13. *Donee treble value al party grieve p. prædial diſmes detaine per tort, &c.*

Sect. 235, 236.

Payment of any money (or of any valuable thing) in the name of ſeiſin of a rent ſeck, before any rent become due, is a good ſeiſin of the rent to have an Aſſ (of no diſſeiſ.) when it is due, and that which is given in the name of ſeiſ. *&c.* worketh his effect to give ſeiſin, and yet it is no part of the rent, nor ſhall be abated out of the rent. *S.* 565.

The grant and delivery of the Deed (and attornment) is no ſeiſin of the rent: and a ſeiſin in Law which the grantee hath by the grant, is not ſufficient to maintain an Aſſ. or any other real action, but there muſt be an actual ſeiſin. *Fo.* 160. *a.*

Alſo

Alſo of a rent ſeck (and ſo it is of a rent charge) *home poit aver aſſ. de mortd. ou Bre. de Ayel, ou de Coſinag. & touts autres manners dactions reals, come la caſe gift, ſicome i poet aver dæſc' auter rent.*

Hereupon ſome have gathered, that a man ſhall have a Writ of Right of a rent ſeck, or of a rent charge, albeit they be againſt common Right. *F. N. B.* 6. 14 *E.* 4, 5.

Sect. 237.

Sont 2. cauſes *de diſſeiſine de* rent ſervice *ſc. reſcous, replein & incloſure; car per tiels choſes le Seignior ë diſturbe de le mean per que il doit au. & vener a ſon* rent, *ſc. de le diſtreſſe.*

But you may make ſix diſſeiſins of a rent ſervice: *Reſcous* of a diſtreſs, reſiſtance to diſtrein, Repl. incloſ. counter pleading of the title, and vouching of a Record and failing, *Fo.* 160. *b.*

In ſome caſes the Tenant may make a *Reſcous, &c.* 1. If no rent be behind when the diſtreſs is taken. 2. If the Tenant tender the rent to the Lord, when he is to take the diſtreſs, and yet the Lord will diſtrein, *&c.* 3. If the rent be behind, and the Lord diſtrein the Cattel of the Tenant in the high way within his Fee, 4. If the Lord will diſtrain, *averia Carucæ*, where there is a ſufficient, *&c.* to be taken beſide. 5. If the Lord coming to diſtrain had no view of the Cattel within his Fee, though the Tenant drive them off purpoſely, or if the Cattel of themſelves after the view goe out of the Fee, or if the Tenant after the view remove them for any other cauſe, than to prevent the Lord of his diſtreſs. In all theſe caſes if the Lord diſtrain the Tenant may make *reſcous. Vide les autorities en ceux caſes (1.) 6 E.* 4. 11. *b. F. N. B.* 102. *E. Lib.* 4. *f.* 11. *Bevill's* c. 8 *H.* 4. 1. *(2.)* 17 *E.* 3. 43. *Reſcous* 14.

If a man come to diſtrain for damage feaſant, and ſee the beaſts in his ſoil, and the other chaſe them out of purpoſe before the diſtreſs taken, if the owner of the ſoil diſtrain them, the owner of the Cattel may reſcue them, for the

the beasts must be damage fesant at the time of the distress. 16 *E.* 4. 10. *Lib.* 9. *fo.* 22. in case de avowrie.

There is a diversity between a Warrant of Record, and a warr. or an Authority in Law; for if a *Capias* be awarded to the Sheriff to arrest a man for felony, albeit the party be innocent, yet cannot he make *rescous*. But if a Sheriff will by authority which the Law giveth him arrest any man for Felony which is not guilty, he may rescue himself. 14 *H.* 7. 20. *tit. Just. de Peace* 9.

To counterplead the Plaintiff in an Ass. by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is if he had pleaded *nul tort, &c.* 24 *Ass.* 3. 29. *Ass.* 52. *Brit. Fo.* 108.

If any man be disturbed to enter and manure his Land, this is a disseisin of the Land it self: for *qui adimit medium dirimit finem; & qui obstruit aditum destruit commodum.* 26 *Ass.* 17. 3 *E.* 4. 2. *par* Littleton.

Sont, 4. *causes de disseisin de* rent charge *sc. Rescous, replevin, enclosure, & denier.* and you may add a Fifth, *viz.* resistance to distrain, counterpleading, and vouching a Record and failer thereof.

Denial is a disseisin of a rent charge as well as of a rent seck, albeit he may distrain for the rent charge as well as for rent service. *Nota*, that when books say that detainer of a rent charge or seck is a disseisin, it must be intended upon a demand made, 14 *E.* 4. 4. *Et Sont* 2. *causes de disseisin de* rent seck, *viz. denier & inclosure.*

Sect. 240.

Maxime paci sunt contraria vis & injuria.

Omnes illos dicimus armatos qui habent cum quo nocere possunt, &c. Bract. Lib. 4. f. 162.

Armorum appellatione non solum scuta & gladii & galeæ continentur, sed & fustes & lapides, as the Poet.

Jamque faces & saxa volant, furor arma ministrat. Virgilius 1. Æneid.

Sed vim vi repellere licet, modo fiat moderamine inculpatæ

patæ tutelæ, non ad ſumendam vindictam, ſed ad propulſandam injuriam. Vide Sect. 589. Where a diſſeiſin ſhall be by way of admittance of the owner of the rent.

Since *Littleton*'s time a right profitable Statute 32 *H.* 8. ca. 37. hath been made for the recovery of arrerages of rents in certain caſes, *&c.*

1. When *Littleton* wrote, the Heirs, Executors or Adminiſtrators of a man ſeiſed of a rent ſervice, rent charge, rent ſeck, or fee ſame in fee ſimple or fee tail, had no remedy for arrerages incurred in the life of the owner of ſuch rents. But now a double remedy is given to the Executor or Adminiſtrator for payment of debts, *&c. viz.* either to diſtrain, or to have an action of Debt.

2. The preamble of the Statute concerning Executors or Adminiſtrators of Tenant for life, is to be intended of Tenant *pur auter vie*, ſo long as *Ceſty que vie* liveth, who are alſo holpen by the ſaid double Remedy: but after the Eſtate for life determined, his Executors or Adminiſtrators might have had an action of Debt by the Commonlaw, but they could not have diſtrained, which now they may, *&c. l.* 4. 49. *Oſnel*'s Caſe. *Dyer* 375.

3. If a man make a leaſe for life or lives, or a gift in tail, reſerving rent, this is a rent ſervice within the Statute.

4. The action of debt muſt be brought againſt them that took the profits when the rents became arrere, or againſt their Executors or Adminiſtrators, but the diſtreſs may be taken upon the land, be it in the Tenants hands, or of any other that claims by or from him; *i. e.* from, or under him by purchaſe, gift or deſcent, and not above him, as the Lord by Eſcheat claimeth, *&c.* by reaſon of his Seigniory, which is a Title Paramount, *l.* 7. 39. *Lillington*'s Caſe, 11 *H.* 4. 94.

5. Lord and Tenant, rent is arrere, the Lord grants his Seigniory, and dieth, The Executor ſhall have no remedy for theſe arrerages, becauſe the grantor himſelf had no remedy for them when he died, in reſpect of his grant; and the act is accordingly.

6. If the Tenant make a leaſe for life, remainder for life, remainder

remainder in fee, Tenant for life pays not the rent due to the Lord, the Lord dieth, Tenant for life dies, the Executor cannot diſtrain upon him in remainder, for he claimes not by deſcent by or from Tenant for life. And ſo it is of a Reverſion.

But if a man grant a rent charge to *A.* for the life of *B.* and letteth the Lands to *C.* for life, the remainder to *D.* in fee, the rent is arrear for divers years; *B.* dieth, *C.* dieth, *A.* may diſtrain *D.* in remainder for all the arrerages, by the latter branch of the Statute, 22 *H.*8. *l.* 5. 118. *Edridge's* Caſe.

7. For the arrerage of the *Nom. Pœnæ*, and for relief, or for *Aid pur fair fits Chivaler*, *&c.* This Statute giveth no remedy.

For arrerages of the *Nom. Pœnæ*, the grantee or his Executor, *&c.* may have an action of Debt, for Relief the Lord muſt diſtrain, but his Executor, by the Commonlaw ſhall have an action of Debt, *W.* 1. c. 36. *F. N. B.* 122.

Note all manner of arrerages of rents iſſuing out of Freehold or Inheritance, whether they be Money, or Corn, Cattle, *&c.* within the Statute; but work days, or any corporal ſervice, *&c.* are not.

8. If a Feme ſole ſeiſed of a rent in fee, taketh husband and dieth; the husband by the Commonlaw ſhould not have the arrerages due before marriage, but now the Statute giveth him remedy for the ſame. *L.* 4. *Ognel's* Caſe.

Finis Libri Secundi.

Liber

Liber Tertius.

CHAP. I.

Of Parceners.

Sect. 241.

OUR Authour having treated in his two former Books, 1. Of Eſtates of Lands and Tenements; and in his ſecond Book of Tenures whereby the ſame have been holden: Now in his third Book doth teach us divers things concerning both of them: as 1. The Qualities of their Eſtates. 2. In what caſes the entry of him that Right hath may be taken away. 3. The Remedies, and in what Caſes the ſame may be prevented or avoided. 4. How a man may be barred of his Right for ever, and in what Caſes the ſame may be prevented or avoided, *vide lib.* & *Nota*, fol. 163.

2 *ou* 3 *parceners ſont forſque un heire a lour Aunceſt*'; for albeit where there be two parceners, they have moities in the lands deſcended to them, yet are they both but one heir, *vid.* S. 8. *verſ. fin.*

Nota diverſitat' between a Deſcent, which is an act of the Law,

Law, and Purchaſe, which is an act of the party. For if a man hath two daughters, *&c.* and one of them is attaint of Felony, the father dieth, the one moity ſhall deſcend to the one daughter, and the other ſhall eſcheat. But if a man make a leaſe for life, the remainder to the right heirs of *A.* being dead, who hath iſſue two daughters, and one is attainted, *&c.* the remainder is void for the whole, for that both the daughters ſhould have been but one heir. *Fleta l.* 5. *c.* 9. *& l.* 6. *c.* 47. *fo.* 164. *a. vide & qu.*

Sunt autem plures participes quaſi unum corpus in eo quod unum jus habent, & oportet quod corpus ſit integrum & quod in nulla parte ſit defectum.

If Lands be given to a man, and to the heirs females of his body, and he hath iſſue a Son and a Daughter, and dieth, the Daughter ſhall have the Land by deſcent; but if a remainder be limited to the heirs females of the body of *I. S. &c.* the Daughter ſhall never take it by Purchaſe, for that ſhe is not heir female of the body of *I. S.* becauſe he hath a Son. And when the right heir doth claim by purchaſe he muſt be a compleat heir in judgment of Law.

And as they be but one heir, and yet ſeveral perſons, ſo have they one Free-hold in the land ſo long as it remains undivided in reſpect of any ſtrangers *Præcipe.* But between themſelves to any purpoſes they have in Judgment of Law ſeveral Free-holds, for the one of them may inſeoff another of her part, and make livery 10 *E.* 4. 17 *E.* 3. 46. *fol.* 164 *a. vide & qu.*

Note a diverſity, *inter deſcenſum in capita, & in ſtirpes.*

If a man hath iſſue two daughters, and dieth, this deſcent is in *capita, viz.* that every ſhall inherit alike. But if a man hath iſſue two daughters, and the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter; all theſe four ſhall inherit, but the daughter of the yongeſt ſhall have as much as the three daughters of the eldeſt, *ratione ſtirpium*, and not *ratione capitum*, for every daughter hath a ſeveral root, *&c.*

Me-

Men descending of daughters, may be Coparceners as well as women, and shall joyntly implead and be impleaded.

Item est alia actio mixta, quæ dicitur actio Familiæ herciscundæ, & locum habet inter eos qui communem habent hæreditatem &c. Et locum habet ut videtur, inter cohæredes, ubi agitur de proparte sororum, vel inter alios ubi res inter partes & cohæredes dividi debeat sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures masculos, &c. Bract. l. 2. fol. 66. 71. *&c. &* l. 5. fol. 443. *b. vide & qu.*

Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ cum dividi non possunt conceduntur uni, ita quod aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, Piscariæ, parci, vel saltem quod partem habeat pro defectu, sicut secundum piscem, tertium, vel quartum, vel secundum actum tertium vel quartum retis. Item in parci secundam, tertiam, aut quartam damam. Bract. l. 2. *fo.* 165. *a.*

Regnum non est divisibile.
Præterea sceptrum Ilione quod gesserat olim
Maxima natarum Priami——Virg. 1. *Æneid.*

If there be two Coparceners of certain lands with Warrant, and they make partition, *&c.* the Warranty shall remain, because they are compellable to make partition.

Tho. de Eberston in Foresta de Pickering, had kept time out of mind a Woodward for keeping of the Woods parcel of that Manor, and had the bark of all the Trees felled, *&c.* as belonging to his Manor; and this was adjudged a good prescription, *Itin. Picky.* 8. *E.* 3. *Rot.* 34.

Sect. 243, & 244, 245.

If Coparceners make partition at full age, and unmarried, and of *sanæ memoriæ* of lands in fee simple, it is good and firm for ever, albeit the values be unequal; but if it be of lands intailed, *&c.* it shall bind the parties themselves, but not

not their iſſues unleſs it be equal. Or if any be Covert, it ſhall bind the husband, but not the wife or her heirs. If ſhall not bind the Infant, *&c. Modus & conventio vincunt legem. Pacto aliquid licitum eſt, quod ſine pacto non admittitur. Quilibet poteſt renunciare juri pro ſe introduct' Conventio autem privatorum non poteſt publico juri derogare.*

Æiſnetia ſemper eſt præferenda propter privilegium ætatis, ſed eſto quod filia primogenita relicto nepote, vel nepte in vita patris vel matris deceſſerit, præferenda erit ſoror antenata tali nepoti vel nepti quantum ad Eeiſnetiam quia mortem parentum expectant.

If there be divers Coparceners of an Advowſon, and they cannot agree to preſent, the Law doth give the firſt preſentment to the eldeſt, and this privilege ſhall deſcend to her iſſue, nay her Aſſigns ſhall have it, and ſo ſhall her husband that is tenant by the Courteſie, *&c.* But it is otherwiſe of a partition in Deed by the act of the party. *Hic vide diverſit. fol. 166. b.*

Cujus eſt diviſio, alterius eſt electio.

Dedi vobis poſſeſſionem quam dividetis ſorte. Numb. c. 26.

Sect. 247.

If one Coparcener maketh a leaſe *pur ans*, yet a Writ of Partition doth lie; but otherwiſe is it, if one or both make a leaſe for life, becauſe *non in ſimul & pro indiviſo tenent*, and the Writ of Partition muſt be againſt the Tenant of the Freehold, 11 *H.* 4. 3. *F. N. B.* 62. g.

And if one Coparcener diſſeiſe another, a Writ of Partition doth not lie, *&c.* for that *non pro indiviſo tenent, &c.* 4 H. 7. 9. 11 *Aſſ.* 23.

If two Coparceners have two Manors by deſcent, and they make partition, that the one ſhall have one Manor for one year, and the other the other Manor for this year, and ſo *alternis vicibus* to them and their heirs, this is a good Partition, *Temps. E.* 1. *partit.* 21. *F. N. B.* 62. 1.

Of partitions in law, ſome be by act in law without Judgment, and ſome be by judgment, and not in a Writ *de Partit. fac.*

If there be Lord, three Coparceners Meſnes, and Tenant and one Coparcener purchaſe the Tenancy, this is not one a partition of the Meſnalty, being extinct for a third part but a diviſion of the Seigniory Paramount, for now he muſt make ſeveral Avowries, 26 *H.* 6. 7.

If one Coparcener make a Feoffment in fee of her part this is a ſeverance of the Coparcenary, and ſeveral Writs of *Præcipe* ſhall lie againſt the other Coparcener, and the Feoffee, 37 *H.* 6. 8. So it is if two Coparceners have iſſue and die, 17 *E.* 3. 15, & 16.

Et ſi aſc' des parceners ſont enget ou diſturbe de ſa ſeiſin per ſes auters parceners, ou pluſor, al diſſeiſee viendram aſſ. per ſeveral pleint ſur les parceners & recovera, mes nemy a tener en ſeveralty, mes en common ſolonque ceo que avant le fiſt, &c. Britton fol. 112. a. And this ſeemeth reaſonable, for he muſt have Judgment according to his plaint, and that was of a moity and not of any thing in ſeveralty; and the Sheriff cannot have any Warrant to make any partition in ſeveralty, or by Metes and Bounds. *Lib.* 6. *fol.* 12, & 13. *Morrice's* Caſe.

Sect. 248.

Si parceners ne voilont agere a partition deſt. fr. enter ex. donque lun poit aver breve partition fac. envers les auters, &. & le vic. en ſon propter perſona alera a les terres, &c. & per le ſerement de 12 *loial homes de ſon bail, &c. ilferra partit. entre les parties, &c.*

There is a book in the Exchequer, called Dooms-day, *dies judicii. Sententia ejusdem libri inficiari non poteſt vel impune declinari, ob hoc nos eundem librum judiciarum nominamus.*

Sheriff is the Reve of the Shire, *Præfectus Satrapiæ, Provinciæ*, or *Comitatus, & habet triplicem cuſtodiam,* 1 *Vitæ Legis.* 2. *Vitæ Reipublicæ. Vicecomes dicitur, quod vicem Comitis ſuppleat. Marculphus* ſaith, This Office is, *Judiciaria Dignitas. Lampridius*, That it is *Officium Dignitatis. Forter* ſaith *Quod Vicecomes eſt nobilis Officiarius. Forteſc.* c. 24. *R.* 2 *cap.*

Verum

Verum quod modo vocatur Comitatus, olim apud Britones temporibus Romanorum in Regno iſto Britan. vocabatur conſulatus, & qui modo vocantur Vicecomites tunc temporis vice-conſules vocabantur; ille vero dicebatur vice-conſul qui conſule abſente ipſius vicem ſupplebat in jure & in foro. Lambert. fol. 129. 12.

Bailiff is an officer concerning the adminiſtration of Juſtice of a certain Province. *Flet. l.* 2. c. 67.

Sect. 249, 250.

Et de la partition que l' vicount ad iſſint ſt. il. ſer. notice la Juſtice, ſouth ſon ſeale, & les ſeales de cheſc' de les 12. *&c.* this *&c.* doth imply, That the principal Judgment upon the partition ſo returned is, *Ideo conſideratum eſt per Cur' quod partitio firma & ſtabilis in perpetuum teneatur.* Lib. 11. fol. 40. *Metcalf's* Caſe.

Partition per agreement per eurer parceners poit eſtre, auxibien per parol ſans fait, come per fait. But a partition between joint-tenants is not good without Deed, albeit it be of Lands, and that they be compellable to make partition by the Statute of 31 *H.*8. c.10. and 32 *H.*8. c. 32. becauſe they muſt purſue that act by Writ *de Partit. fac.* And a partition between joint-tenants without Writ, remains at the Commonlaw, which could not be done by Parol. And where books ſay, That joint-tenants made partition without Deed, it muſt be intended of *Tenants en Common*, and executed by livery, *S.*290. 3*H.*4.1. *lib.* 6. 12. 13. 2*E. Dyer* 179. 28*H.*8. *Dyer* 29. 1. *Mar. Dyer* 98.

Nota, between joint-tenants there is a twofold privity, *viz.* in Eſtate, and in poſſeſſion; between tenants in common, there is a privity onely in poſſeſſion, but parceners have a threefold privity, *viz.* in Eſtate, in perſon, and in poſſeſſion.

Sect. 251, *&c.*

A rent may be granted for owelty of partition without Deed. So it is of Common of Eſtovers, or a Corody, or a

Common of pasture, &c. albeit they lie in grant, &c. But if rent be granted out of other Lands, then descended to the Coparceners, then there must be a Deed, 1 *Mar. Dyer* 18.

Sect. 253, &c.

Mes tiel rent ë rent charge de common droit eroe & reserve par egality de partit. Et nota, that reservation here, is taken for a Grant.

J. S. seised of Lands in fee, hath issue two daughters, *R.* and *A.* Bastard eigne, and Mulier puisne, and dieth, *R.* and *A.* enter and make partition: *A.* and her daughter are concluded for ever, 21 *E.* 3. 34. 35. 11 *Ass.* 23.

Sect. 256, 257, 258.

2 *Parceners prent Barons, si parit. fait perenter eux* * *soit tort all, &c. donque il ne poit estre apurs defeater, &c.*

Judicis officium est, ut res ita tempora rerum
Quærere, quæsito tempore tutus eris.

An unequal partition in the Chancery, shall not bind an Infant, *F. N. B.* 256, 259, 260, &c. But it may be avoided either by *Scire fac.* in the Chancery, or by a Writ *de partit. fac.* at the Commonlaw, 21 *E.* 3. 31.

A partition made by the King's Writ *de partit. fac.* by the Sheriff by the Oath of 12 men, and Judgment thereupon given, shall bind the Infant, though his part be unequal, *causa qua supra,* fo. 171.

Sect. 259.

Si asc' fait, feoffment, grant, release, confirmation, obligation, ou auter escript' soit fait per asc' devant son plein age de 21 ans ou si asc' deins tiel age soit Bayliff ou receivor a asc' home tout sera pur nient, &c. Auxi home devant le dit age ne sera my jure en Enqueste, &c.

Fait, is an instrument consisting on three things; viz. Writing, Sealing, and Delivery, comprehending a Bargain or Contract between party and party, man or woman.

Obliga-

Obligation, is commonly taken in the Commonlaw for a Bond containing a penalty with condition for payment of Money, or to do or ſuffer ſome act or thing, *&c.* And a Bill is moſt commonly taken for a ſingle Bond without condition, *f.* 172. a.

An Infant may bind himſelf to pay for his neceſſary Meat, Drink, Apparel, neceſſary Phyſick, *&c.* and likewiſe for his good teaching, and inſtruction, whereby he may profit himſelf afterwards. But if he bind himſelf in an Obligation or other Writing, with a penalty for the payment of any of theſe, that Obligation ſhall not bind him, 18 *E.* 4. 2. *lib.* 9. *f.* 87. *Pinchon's* Caſe.

Alſo other things of neceſſity ſhall bind him, as a preſentation to a Benefice, for otherwiſe the lapſe ſhall incur againſt him. And if an Infant be Executor upon payment of any debt due to the Teſtator, he may make an Acquittance, but in that caſe a Releaſe without payment is void, and generally whatſoever an Infant is bound to doe by Law, the ſame ſhall bind him, albeit he doth it without ſute of Law. 2 *M. Dyer* 104.

An action of account doth lie againſt a Bayliff that hath adminiſtration and charge of Lands, goods, *&c.* for the profits which he hath raiſed or made, or might by his induſtry or care have reaſonably raiſed, or made (his reaſonable charges and expences deducted) *Brit. fol.* 62, 70. 41 *E.* 3. 39.

An Account againſt a Receiver, is when one receiveth money to the uſe of another, to render an account, but upon his account he ſhall not be allowed his expences and charges: Except in ſome caſes; As if two joint Merchants occupy their Stock, *&c.* in common; one of them naming himſelf a Merchant, ſhall have an account againſt the other naming him a Merchant, and ſhall charge him as *Receptor denariorum ipſius* B. *ex quacunque cauſa & contractu ad communem utilitatem ipſorum* A. *&* B. *provenient' ſicut per legem mercatoriam rationabiliter monſtrare potuit,* 43 *E.* 3. 31. 30 *E.* 1. Account 127. 10 *H.* 7. 16. *lib. Intrat.* 17, 18, 19. *F.N.B.* 118.

So as there be but three kinds of Writs of Account, *viz.* 1. Againſt one as Guardian. 2. Againſt one as Bayliff. And 3. As Receiver, *F. N. B.* 219. *d.*

And to maintain an action of account, there muſt be either a privity in deed by the conſent of the party, 2 *Mar. B. Account* 89. *F. N. B.* 117. *Pl. Com.* 542. 2 *H.* 4. 12. 4 *H.* 7. 6. *&c.* or a privity in law *ex proviſione legis*, as againſt a Guardian, *&c.*

Minor furare non poteſt. Bract. *l.* 5. *f.* 340. *b.* For an Infant cannot make his Law of *Non-ſummons*, 13 *E.* 3. *Ley* 50. and therefore the default ſhall not prejudice him. 2. *Mar. Dyer* 104. 105. But an infant of the age of 12 years ſhall take the oath of allegiance, *&c. Vide Sect.* 85. 91.

An infant cannot upon his oath make his Law in an action of debt, 1 *H.* 7. 25. 15 *E.* 4. 2. and the husband and wife of full age for the debt of the wife, before the converture ſhall make their Law. 9 *E.* 4. 24. 15 *E.* 4. 2.

Grant is a Conveyance of a thing which cannot paſs without Deed, as advowſons, rents, *&c. lib.* 3. *f.* 63. *Lincol. Colle.*

Sect. 260, 261.

The reverſion expectant upon an Eſtate tail is of no account in Law, for that it may be cut off by the Tenant in Tail. Tres. in fee *S.* and fee Tail deſcend al 2. files, *&c.*

If the youngeſt daughter alien part of the Lands in fee ſimple and dieth, ſo as a full recompence for the lands entailed deſcends not to her iſſue, ſhe may wave the taking of any profits thereof, and enter into the land entailed, for the iſſue in tail ſhall never be barred without a full recompence, though there be a Warr. in Deed or in Law deſcended. *Fo.* 173. *a.*

If a man be ſeiſed of three Manors of equal value in Fee, and taketh wife, and chargeth one of the Manors with a rent charge, and dieth, ſhe may by the proviſion of the Law take a third part of all the Manor and hold them diſcharged, but if ſhe will accept the entire Manor charged, it is holden, that ſhe ſhall hold it ſo. 26 *E.* 3. *Dower* 133. 18 *H.* 6. 17.

A par-

A partition of Lands entailed between parceners, if it be equal at the time of the partition ſhall bind the iſſues in tail for ever, albeit the one do alien her part. *Dyer* 1. *Mar.* 98.

Sect. 262.

When the privity of the Eſtate is deſtroyed by the Feoff. of one parcener, upon eviction of a moity by force of an entail againſt the other, ſhe ſhall not enter upon the alience. But in the caſe that *Littleton* putteth (of diſſeiſin of an Infant, *&c.*) when the privity of the Eſtate remaineth, and the part of one is evicted, he ſhall enter and hold in Coparcenary with her other Coparcener, and ſo it is in the caſe of an exchange. 15 *E.* 4. 3. *a. per Littleton Lib* 4. 221, *&c. Baſtard's* c.

If the whole Eſtate in part of the property be evicted, that ſhall avoid the partition in the whole, be it of a Manor that is entire, or of acres of ground, *&c.* that be ſeveral; for the partition in that caſe implyeth for this purpoſe both a warr. and a condition in Law, and either of them is entire, and giveth an entry in this caſe in the whole. 13 *E.* 4. 3. 42 *Aſſ.* 22. *& Lib.* 4. *ante*, *&c.*

Alſo if any Eſtate of freehold be evicted from the Coparcener in all, or part of her property, it ſhall be avoided in the whole. *vide. libr. & nota Fo.* 170. *a. ex grat.*

If but part, *&c.* be evicted, as an Eſtate in tail, or for life, leaving a reverſion in the Coparcener.

Where one Coparcener taketh benefit of the condition in Law ſhe defeateth the partition in the whole. But when ſhe vouched by force of the Warr. in Law for part, the partition ſhall not be defeated in the whole, but ſhe ſhall recompence for that part, *Sic nota diverſit.* 5 *E.* 3. *Tit. Voucher* 249.

Alſo; there is another diverſity between a recovery in value by force of the Warranty upon the exchange and upon the partition, for upon the exchange he ſhall recover a full recompence for all that he loſeth: but upon the partition ſhe ſhall recover but the moity or half of that which is loſt, to the end that the loſs may be equal. There are more and

greater privities in case of partition in persons, bloud, and estates, than there is in exchanges, 19*H.*6. 26. 18*E.*2. *t. aid.* 171.

When the whole Privity between Coparceners is destroyed there ceaseth any recompence to be expected either upon the condition in Law, or warranty in Law (by force of the partition) *Fo.* 174. *a.*

If one Coparcener maketh a Feoffment in Fee, and after her Feoffee is impleaded, and voucheth the Feoffer, she may have aid of her Coparcener to deraign a Warrant Paramount, but never to recover *pro rata* against her by force of the warrant in law upon the partition, for by her alienation she hath dismissed her self to have any part of the Land, as Parcener. And as Parcener she must recover *pro rata*, *&c.* 31 *E.* 3. 24. 11 *H.* 4. 22, 23. And yet in some case the Feoffee of one Coparcener shall have aid, *&c.* and therefore if there be two Coparceners, and they make partition, and the one of them infeoffs her Son and heir apparent, and dieth, the Son is impleaded, he shall pray in aid, *&c.* for that the warranty between the Mother and the Son is by Law adnulled, and therefore the Law giveth the Son, albeit he be in by Feoffment, to pray in aid of the other parcener to deraign the Warrant Paramount: wherein note the great Equity of the Commonlaw, 43 *E.*3. 23. *Pl. Com.* 32 *E.*1 *tit. Aid.* 178.

But if a man be seised of Lands in fee, and hath issue two daughters, and make a gift in tail to one of them, and die seised of the Reversion in fee which descends to both Sisters, and the Donee of her issue is impleaded, she shall not pray in aid, *&c.* either to recover *pro rata* or to deraign the Warrant, *&c.* for that the other Sister is a stranger to the State tail, whereof the eldest was sole tenant, and never partition was or could be thereof made, 2 *H.*6. 16.

Albeit it is in the power of the Tenant tail to cut off the Reversion: yet if the Infant enter before it be cut off, the Law hath such Consideration of this Reversion, that she that loseth it shall enter into her Sisters part, and hold with her in Coparcenery, for that the privity between them was not wholly destroyed.

Sect.

Sect. 263, 264.

Si le part du parcener ſoit defeat per loial entre, &c. el poit enter & occupier oueſq; les auter parceners, &c. & eux compeller de faire novell partition, &c.

Breve de partit, fac. gift pur parceners tantſolement. Et ciel breve gift envers tenant per le curt' & encore il men ne poit aũ tiel breve.

Albeit that the Tenant by the Curteſie be an eſtranger in blood, yet the Writ *de partit. fac.* clearly lies againſt the Tenant *per* Curteſie, becauſe he continueth the ſtate of Coparcenery, 3 *E.* 3. 47.

Alſo if two Coparceners be, and one doth alien in fee, they are Tenants in Common, and ſeveral Writs of *Præcipe* muſt be brought againſt them; and yet the parcener ſhall have a Writ of partition againſt the alienee at the Commonlaw, 28 *E.* 3. 5.

If there be three Coparceners, and the eldeſt taketh huſband, and the husband purchaſe the part of the youngeſt, he and his wife ſhall have a Writ of Partition againſt the middle ſiſter at the Commonlaw, becauſe he is ſeiſed of one part in the right of his wife who is a Parcener, *Dyer* 1. *Mar.* 98. *F. N. B.* 52. *Regiſt.*

Since *Littleton* wrote, by the Statute 31 *H.* 8. c. 1. 32 *H.* 8. *cap.* 32. *vide Sect.* 290. one joint-tenant, or tenant in common, may have a Writ of Partition againſt the other, and therefore the alienee of one parcener may have a Writ of Partition againſt the other parcener, becauſe they are Tenants in common.

So Tenant *per* Curteſie ſhall have a Writ, *&c.* upon the Statute, for albeit it is neither joint-tenant nor tenant in common, for that a *Præcipe* lieth againſt the parcener and tenant *per* Curteſie, yet he is in equal miſchief as another tenant for life. *Br. tit. Partit.* 141. *Dyer* 3. *M.* 128. *A. &* 7 *Eliz.* 243.

CHAP. II.

Parceners by Cuſtome.

Sect. 265, *&c.*

PArcenery *per le Cuſtome eſt lou terres diſcend a les fits en Gavelkind, &c. & in Wallia, hæreditas partibilis eſt inter hæredes maſculos.* Sect. 212. Stat. Walliæ, 12 E. 1.

Sons are parceners in reſpect of the Cuſtome of the fee or inheritance, and not in reſpect of their perſon, as Daughters and Siſters, *&c.* be, *Bracton, l.* 5. *fo.* 428.

Hotchpot, eſt de mitt. les terres leign ſoer en frankmarriage, & les terres del auter ſoer en fee ſimple enſemble, & donques partit. ſerre fert, &c. Vide Sect. 6. 266, *&c.*

There muſt be a Cuſtome alledged in ſome County, *&c.* to inable the wife or children to the Writ *de rationabile parte bonorum*, Regiſt. 142. 34 *E.* 1. *Detin.* 56. 7 *E.* 4. 21.

But ſuch as be reaſonably advanced by the Father, *&c.* ſhall have no farther part of the goods; for the words of the Writ be, *Nec in vita patris promoti fuerunt.* 3 E. 3. *Detin.* 156. 40 E. 3. 18. *fo.* 176. *b. vide & nota.*

Sect. 268, and 269.

After this putting into Hotchpot, and partition made, the lands given in Frankmarriage, are become as the other lands which are deſcended from the common Anceſtor; and of theſe lands if ſhe be impleaded, ſhe ſhall have aid, *&c.* So if the Coparcener that hath a rent granted to her for owelty of partition, hath the rent, as it had deſcended to her, *&c. Brit. cap.* 72. 10 *E.* 3. 37. 29 *Aſſ.* 23.

Et tout foits ſur tiel partit' les terres dones en Frankmarriage demurgent a les Donees, & a louer heires ſolonque le forme de le done. Car lauter parcenter navoit riens de ceo, &c. vide lib. fo. 177. b.

Quod

Quod est inconveniens, aut contra rationem, non est permissum in lege.

Sect. 271, 272, 273.

Dones en frankmarriage sueront per la common ley deuter lest. west. 2. *& tout temps puis ad este continue, &c.*

The gifts do continue, but not the Estates, 12 *H.* 4. 11.

Item tiel mitter en Hotchpot, &c. est lou les auters terres ou tenements que ne fuer' Dones en frankmarriage descend de les Donors en frankmarriage tousolement, &c.

Si les terres dones in frankmarriage sont de tant egall va. pur le an. que le remnant sont ou de pluis value en vaine tiels tres, &c. ser. mis en Hotchpot, &c.

Lex non præcipit inutilia, inutilis labor stultus.

The Law shall adjudge of the value, as it was at the time of the partition, *f.* 179. a. *vide & nota*, unless the Land be improved or decaid by the proper act or default of the parties.

Sect. 274, *&c.*

Nota, que terres ne ser. mis, &c. forsque ou ils discent en fee simple car de terres discendus en fee tail partit. Jerra fait sicome nul tiel done en frankmarriage ad este fait; for the issue claimeth *per forman doni, & voluntas donatoris, &c. observetur*

If the Ancestor infeoff one of his daughters of part of his land, or purchase lands to him and her, and their heirs, or giveth her part of his lands in tail, yet she shall have a full part of the remnant of the Lands in fee simple, for the benefit of putting, *&c* into Hotchpot, is onely appropriate to a gift in frankmarriage (*quia maritagium cadit in partem*) which shall be accounted as parcel of her advancement, 13 *E.* 2. *tit. Tail. Bract. l.* 2. *fo.* 77.

Sect. 276.

Nota, that *modus & conven' vincunt legem*; *& consensus tollit errorem.* But if partition be by the King's Writ, then every parcener must have his part, 24 *H.* 3. *tit. partit.* 19.

CHAP. III.

Of Joint-tenants.

Sect. 277.

THere be joint-tenants by other Conveyances than *Littleton* here mentioneth; as by Fine, Recovery, Bargain and Sale, Releaſe, Confirmation, *&c.* So there be divers other limitations, *&c.* As if a rent charge be granted to *A.* and *B. habendum* to them two, *viz.* to *A.* untill he be married, and to *B.* untill he be advanced to a Benefice, they be joint-tenants in the mean time, *&c.* And if *A.* die before marriage, the rent ſhall ſurvive, but if *A.* had married, the rent ſhould have ceaſed for a moity: *& ſic è converſo*, on the other ſide.

If an alien and ſubject purchaſe lands in fee, they are joint-tenants, and the ſurvivorſhip ſhall hold place; *Et nullum tempus occurrit regi* upon an office found, 7 *E.* 4. 29. 11 *H.* 4. 26.

Sect. 278.

Omnis rati-habitio retrotrahitur & mandato æquiparatur.

Nota, That ſeeing Coadjutors, Counſellors, Commanders, *&c.* are all diſſeiſors, albeit the diſſeiſor which is tenant dyeth, yet the Aſſize lieth againſt the Coadjutor, *&c.* and tenant of the Land, though he be no diſſeiſor.

The Demandant and others in a *præcipe* did diſſeiſe the tenant to the uſe of the others, and the Writ did not abate, for the Demandant was a Diſſeiſor, but gained no tenancy in the Land, for that he was but a Coadjutor, 50 *E.* 3. 2.

A man diſſeiſed tenant for life to the uſe of him in the reverſion, and after he in the reverſion agreeth, *&c.* he is a diſſeiſor in fee, for by the diſſeiſin the reverſion was diveſted which

which (ſome ſay) cannot be reveſted by the agreement of him in the reverſion, for that it maketh him a wrong doer, and therefore no relation of an Eſtate by wrong can help him.

Sect. 279.

Diſſeiſin eſt properment lou un home enter eu aſc' terres, &c. lou ſon entre nem pas congeable & ouſta celuy que ad franktenement, &c. This deſcription, *&c.* is underſtood onely of ſuch lands, *&c.* whereinto an entry may be made, and not of Rents, Commons, *&c.*

Every entry is no diſſeiſin, unleſs there be an *ouſter* alſo of the freehold; as an Entry and a Claimer, or taking of Profits, *&c.* 3 *E.* 4. 2. 34 *Aſſ.* 11. 12. *Pl. Com.* 89. *Parſon de Honeylane.*

Now as there be joint-tenants by Diſſeiſin, ſo are there joint-tenants, by Abatement, Intruſion and Uſurpation.

Sect. 280.

Nota que le nature de jointenancy eſt, que le ſurvivor aïa ſolement lentier tenancy ſolunque tiel eſtate que il ad, ſi le jointure ſoit continue, &c. mes auterment eſt de parceners.

Although ſurvivorſhip be proper to joint-tenants, yet it is not proper *quarto modo:* for if a man letteth Lands to *A.* and *B.* during the life of *A.* if *B.* dieth, *A.* ſhall have all by the ſurvivor, but if *A.* dieth, *B.* ſhall have nothing.

Two or more may have truſt or authority committed to them jointly, and yet it ſhall not ſurvive. But with a diverſity between a naked Truſt, *&c.* and a Truſt joined to an eſtate or intereſt. 2. There is a diverſity between Authorities created by the party for private cauſes, and Authority created by Law for execution of Juſtice, *Ex. gr.*

As if a man deviſe that his two Executors ſhall ſell his Land, if one of them die, the ſurvivor ſhall not ſell it, but if he had deviſed his Lands to his Executors to be ſold, there the ſurvivor ſhall ſell it, 39 *Aſſ.* p. 17. 30 *H.* 8. *tit. Deviſe, Br.* 31. *Dyer* 3 *El.* 190. *Br. tit. Cond.* 190.

If a man make a Letter of Atturny to two to doe any act, the ſurvivor ſhall not doe it: but if a *Venire fac.* be awarded to four Coroners to impannel and return a Jury, and one of them die, yet the other ſhall execute and return the ſame.

If a Charter of Feoffment be made, and a Letter of Atturney to four or three jointly or ſeverally to deliver ſeiſin, two of them cannot make livery, becauſe it is neither by them four or three jointly, nor any of them ſeverally, 38 *H.* 8. *Dyer* 62. 27 *H.* 8. *f.* 6.

But if the Sheriff upon a *Capias* directed to him, make a Warrant to four or three Jointly or ſeverally to arreſt the Defendant, two of them may arreſt him, becauſe it is for the execution of Juſtice, which is *pro bono publico.* Paſch. 45 *Eliz. in Banco Reg. inter* King and *Hobbes.*) Not of that kind of the Infidel of *Malmsbury.*)

Sect. 281, 282.

Survivor holdeth place regularly, as well between joint-tenants of goods and Chattels in poſſeſſion or in right, as of Inheritance or Free-hold, *fo.* 182. a.

Si un obligation ſoit fr. a pluſors pur un debt celuy que ſurvequiſt avera tont le debt ou duty, & iſſent eſt daverts Covenants & Contracts, &c. Mes, Jus accreſcendi inter mercatores pro beneficio commercii locum non habet, F. N. B. 117. E. 38. E. 3. 7.

Sect. 283.

Terres ſont dones a 2. *homes, & a les heires de lour* 2. *corps engendres, en cen caſe les donees ont joint eſtre pur lour* 2. *vies, & encore ils ont ſeveral inheritances entant que ils ne poient aver per nul poſſibility un heire enter eux engendre, ſicome home & ſeme point aver, &c.*

Note, albeit they have ſeveral inheritances in tail, and a particular Eſtate for their lives, yet the inheritance doth not execute, and ſo break the joint-tenancy, but they are joint-tenants for life, and tenants in common of the inheritance in tail.

Here

Here a diverſity is implyed, when the ſtate of inheritance is limited by one Conveyance, as in this caſe it is, there are no ſeveral Eſtates to drown one in another: but when the ſtates are divided into ſeveral Conveyances, their particular Eſtates are diſtinct, *&c.* and the one drowns the other. As if a leaſe be made to two men for term of their lives, and after the leſſor granteth the reverſion to them two, and to the heirs of their two bodies, the jointure is ſevered, and they are tenants in common in poſſeſſion; and it is further implyed, that in this Caſe of *Littletons* there is no diviſion between the Eſtates for lives, and the ſeveral inheritances becauſe they cannot convey away the inheritance after their deceaſe, for it is divided onely in ſuppoſition of law, and to ſome purpoſes the inheritance is ſaid to be Executed, 12 *E.*4. 2. *b.*

If a man make a leaſe for life, and after granteth the reverſion to the tenant for life and to a ſtranger, to their heirs, they are not joint-tenants of the reverſion, but the reverſion by act of Law is executed for the one moity in the tenant for life, and for the other moity he holdeth it ſtill for life, the reverſion of that moity to the grantee, 39 *H.*6. 2. b.

And ſo it is if a man make a leaſe to two for their lives, and after granteth the reverſion to one of them in fee, the jointure is ſevered and the reverſion is executed for the one moity, and for the other moity there is tenant for life, the reverſion to the grantee. *Vide Weſtcote's* Caſe, *Lib.*2, *fo.*60, 61.

If leſſee for life granteth his Eſtate to him in the reverſion, and to a ſtranger, the jointure is ſevered, and the reverſion executed for the one moity by the act of the Law, 7 *H.* 6.

If a man make a leaſe for life, and grant the reverſion to two in fee, the Leſſee granteth his eſtate to one of them, they are not joint-tenants of the reverſion, for there is an execution of the Eſtate for the one moity, and an Eſtate for life, the reverſion to the other of the other moity.

Si

Si home voet leſſer terre a un auter par fait, ou ſans fait, nient feſant mention que eſtate il avoit, & fert livery, &c. en ceo cas le leſſe ad eſtate pur tinere de ſa vie.

Quælibet conceſſio fortiſſimè contra donatorem interpretanda eſt. Legis (autem) conſtructio non facit injuriam. Pl. Com. in *Throgmorton's* Caſe.

If a leaſe be made to two, *habendum*, to the one for life, the remainder to the other for life, this doth alter the general intendment of the premiſſes. *Et ſemper expreſſam facit ceſſare tacitum*, 30*H.*8.*tit. Jointenants. Br.*53. *Dyer f.*361. *Pl. Com.*100.

Nota, where the grant is impoſſible to take effect according to the letter, there the Law ſhall make ſuch a conſtruction at the gift by poſſibility may take effect, *benignæ faciendæ ſunt interpretationes cartar. propter ſimplicitatem laicorum ut res magis valeat quam pereat, fo.* 183. *b.*

Cognitio legis eſt copulata & complicata. Tunc unumquodque ſcire dicimur cum primam cauſam ſcire putamus: ſcire autem propriè eſt rem ratione & per cauſam cognoſcere. Ariſt. 1 Metap. Virg. 1. Georg.

Felix qui potuit rerum cognoſcere cauſas.

If a gift be made to two men, and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joint-tenants for life, tenants in common of the eſtate tail, and joint-tenants of the fee ſimple in remainder, for they are joint purchaſers of the fee ſimple, and the remainder in fee is a new created eſtate, but the reverſion remaining in the donor, or his heirs, is a part of his ancient fee ſimple, *Dyer* 14*El.*309.

Sect. 284.

Lou terre ë done a. 2. *females & a les heires de lour* 2. *corps ingendres.* It hath been ſaid, that the husband, *&c.* ſhould be Tenant *pur le Curt'* living the other ſiſter, 17 *E.*3. 51. 78. and that the iſſue of the one ſhould recover the moity in a Formedon, living the other ſiſter, 44*E.*3. Tail 13. 7*H.*4. 16. *Corbet's* c. *l.* 1. *f.*8. 84. 6. 4. *Mar. Dyer* 145. But *Littleton* hath reſolved this doubt, *Vid. fo.* 183. *a.*

If

If a man give lands to two men and one woman, and the heirs of their three bodies begotten, they have ſeveral inheritances. For the Law will never intend a poſſibility upon a poſſibility. *Fo.* 184. a.

Sect. 285.

If a fine be levied to two and to the heirs of one of them by force whereof he is ſeiſed, he that hath Fee dieth, and after the joint-tenant for life dieth, and an eſtranger abates, in this caſe the heir may either ſuppoſe the Fee ſimple executed, and have an Aſſ. of Mordanc. *ou briefe de droit:* or he may have a *ſcire fac.* to execute the fine, or maintain a Writ of intruſion, by which the heir ſuppoſeth that the Fee was not executed. 11*H.*4. 55. *F. N. B.*196. and 219. and he ſhall term it a remainder; and yet when Land is given to two, and to the heirs of one of them, he in the remainder cannot grant away his Fee ſimple.

Sect. 286.

2. *Jointenants de terre, &c. celuy que ſurveſquiſt claima & ad la terre per le ſurvivor, & nemy ad, ne poit de ceo claimer rien per diſcent de ſon compagnon, &c. Mes auterment eſt de parceners, &c.* and the diverſity is, for that the Survivor doth claim above the grant, *&c.* and the heir by diſcent under, *&c.*

If two joint-tenants be of a term, and the one of them grant to *J. S.* that if he pay to him 10. l. deut. *Mich.* that then he ſhall have his term, the grantor dieth before the day, *J. S.* paies the ſum to his executor at the day, yet he ſhall not have the term, but the ſurvivor ſhall hold place, for it was but in nature of a communication, but if he had made a leaſe for years to begin at *Mich.* it ſhould have bound the Survivor. 14*H.* 8. 22. *Pl. Com.* 263. *b. Hale's* Caſe. *Jus accreſcendi præfertur oneribus, & alienatio rei præfertur juri accreſcendi.*

If one joint-tenant in Fee ſimple be indebted to the King, and dieth, no extent ſhall be made upon the land in the hands of the Survivor. 40 *Aſſ.* 36. *F. N. B.*149. *Pl. Com.*321.

If a recovery be had againſt one joint-tenant who dieth before

fore execution, the Survivor ſhall not avoid this recovery, becauſe that the right of the moity is bound by it.

If one joint-tenant in Fee take a Leaſe for years of a ſtranger *per ſt. indent.* and dieth, the Survivor ſhall not be bound by the concluſion, becauſe he claims above it, *&c.*

If two joint-tenants be in Fee, and the one make a Leaſe for years reſerving a rent, and dieth, the ſurviving Feoffee ſhall have the reverſion by ſurvivor, but not the rent, becauſe he claimeth in from the firſt Feoffor which is paramount the rent. *Dyer M.*2 *&* 3. *El.*187. *lib.*1. *fo.*96. and *lib.*6. *f.*78, 79.

If one joint-tenant granteth a rent charge out of his part, and after releaſe to his joint companion, and dieth, he ſhall hold the land charged, becauſe he claimeth not by the ſurvivor, in as much as the rel' prevent. the ſame. 33 *H.* 6. 3. 2. 9 *El. Dyer* 263. *fo.* 185. a.

But all men agree, that if *A. B.* and *C.* be joint-tenants in Fee, and *A.* charge his part, and then releaſe to *B.* and his heirs and die, that the charge is good for ever; for *B.* cannot be in from the firſt Feoffor, becauſe he hath a joint companion at the time of the releaſe made, and ſeveral Writs of præc. muſt be brought againſt them. 37 *H.* 8. tit. alienation. *Br.* 31. 10 *E.* 4. 3. b.

Sect. 287.

Jus accreſcendi prefertur ultimæ voluntati.

Although an infant, *eſt unum indiviſible tempore quod* non *è tempus nec pars temporis, ad quod tamen partes tempt. connectuntur*, and that *inſtans eſt finis unius temporis, & principium alterius*: yet in conſideration of Law, there is a priority of time, in an inſtant, as here the ſurvivor is preferred before the deviſe, which *Littleton* diſtinguiſheth by theſe words, *poſt mortem, & per mortem. Pl. Com. Fulmerſton*'s Caſe.

Two femes joint-tenants of a leaſe for years, one of them taketh husband, and dieth, yet the term ſhall ſurvive; for though all chattels reals are given to the husband, if he ſurvive, yet the ſurvivor between the joint-tenants is the elder Title, and after the marriage the feme continued ſole poſ-

ſeſſed

ſſed, for if the husband dieth, ſhe ſhall have it, and not the executors of the husband, but otherwiſe it is of perſonal goods, *fol.* 185. *b. vide, &c.*

Inprimis autem debet quilibet qui teſtaverit, dominum ſuum de meliore re quam habuerit recognoſcere, & poſtea eccleſiam de alia meliore, &c. Fleta, lib. 2. cap. 50.

Sect. 288.

Cheſc' joint. eſt ſei del terre que il tient joint. per my & per tout. & ſic totum tenet & nihil tenet, ſc. totum conjunctim, & nihil per ſe ſeparatim; and albeit they are ſo ſeiſed, yet to divers purpoſes each of them hath but a right to a moity, as to enfeoff, give, or demiſe, or to forfeit or loſe by default in a *Prec.* 40 *Aſſ.* 79. *Brit. cap.* 35.

A communi obſervantia non eſt recedendum.

If two joint-tenants be, and both they make a feoffment in fee upon condition, and that for breach thereof one of them ſhall enter into the whole, yet he ſhall enter but into a moity, becauſe no more in judgment of Law paſſed from him; and ſo it is of a gift in tail, or a leaſe for life, *&c. Pl. Com. Browning's* c.

If two joint-tenants make a feoffment in fee, and one of the feoffors die, the feoffee cannot plead a feoffment from the ſurvivor of the whole, becauſe each of them gave but his part, but otherwiſe it is on the part of the feoffees, 14 *E.* 4. 5. *fol.* 186. a.

Two joint-tenants *de terres, &c.* And one of them by Deed indenture bargain and ſell the Lands, and the other joint-tenant dieth, and then the Deed is inrolled, there ſhall paſs but a moity, 6 *E.* 6. *Tit. Faits inroll.* 9 *Br.*

Sect. 289.

En grant de rent charge *per joint. &c. les tenements demurgants ſoits come ils fuer. advat. ſans ceo que aſc' ad aſc' drt. dañ & parcel de les tenem. forſ. eux me. & les tenem. ſont en tiel plite come ils fueront devant le charge, &c. mes ou les ẽ ft. per un joint. un aut. per terme de ans, &c. maint. per force de leaſe, le leſſee ad drt.*

drt. en m. la terre ſe de tout ceo que a ſon leſſor affiert, & dañ ou per forc de leaſe durant ſon Feme. Fo. 186. *b.*

If two joint-tenants be of an Advowſon, and the one preſent, *&c.* and his Clark is admitted and inſtituted, this in reſpect of the privity ſhall not put the other out of poſſeſſion, but if that joint-tenant that preſenteth dieth, it ſhall ſerve for a title in a *Qu. Imp.* brought by the ſurvivor, 11 *H.*4. 54. 10 *E.*4. 94. 1 *H.*7. 1. b. 9 *El. Dyer* 259. 6 *E.*4. 10. b. *Doct. & St.* 116. *F. N. B.* 34. u. But yet if one joint-tenant or tenant in common preſent, or if they preſent ſeverally, the ordinary may either admit or refuſe, *&c.* ſuch a preſentee, unleſs they join in a preſentation, and after the ſix months he may preſent by *lapſe*. But if two Coparceners be, *&c.* and they cannot agree to preſent, the eldeſt ſhall preſent, and if her ſiſter doth diſturb her, ſhe ſhall have a *qu. imp.* and ſo ſhall the iſſue and the Aſſignee of the eldeſt, and yet he is tenant in common with the youngeſt, and ſo tenant *per* Curteſie of the eldeſt ſhall preſent. 38 *H.* 6. 9. 5 *H.* 5. 10. *F. N. B.* 34.

Sect. 290.

Joint-tenants *(ſils violont) faire partition, &c.*

But this partition muſt be by Deed. *Vide Sect.* 249. 318.

But joint tenants for years may make partition without Deed, 18 *Eliz.* 350. b. *Dyer.* Since *Littleton* wrote, joint-tenants and tenants in common are compellable to make partition by Writ Stat. 31 *H.*8. c. 1. 32 *H.* 8. c. 32. *Sect.* 264. 247. 259. *F. N. B.* 9. b. 62. b. *lib.* 6. *Fo.*12, 13. *Morrice's* c.

If one joint-tenant or tenant in common diſſeiſe another, and the diſſeiſee bring his Aſſ. for the moity, though the plaintiff prayeth it, yet no Judgment ſhall be given to hold in ſeveralty, for then at the Commonlaw there might have been by compulſion of Law a partition between joint-tenants and tenants in common, and by rule of Law the Plaintiff muſt have Judgment according to his plaint or demand. 187. a.

Sect. 291, *&c.*

Baron & feme ſont & forſq; un perſon en ley, vir & uxor ſunt quaſi unica

unica perſona, quia caro una, & ſanguis unus. Lib. 4. fo. 68. *Toker's* c. *Pl. Com.* 483. *Nicholl's* c.

If an eſtate be made to a man and a woman and their heirs before marriage, and after they marry the husband and wife have moities between them. If a Feoffment be made to a man and a woman, and their heirs with warranty, and they entermarry, and after are impleaded and vouch, and recover in value, moities ſhall not be between them; for though they were ſole when the warranty was made, notwithſtanding at the time when they recovered and had execution, they were husband and wife, in which time they cannot take by moities. *Fo.* 187. b. *Vide, &c.*

A right of Action, and a right of entry may ſtand in jointture. *Vide Sect.* 302. *F. N. B.* 193. *k.*

A right of action, or a bare right of entry cannot ſtand in jointure with a freehold or inheritance in poſſeſſion; and therefore if the husband make a Feoffment of the moity, this was a diſcontinu. of that moity, and the other joint-tenant remained in poſſeſſion of the freehold and inheritance of the other moity, which for the time was a ſeverance of the jointture. Statute of 32 *H.* 8. *ca.* 1.

If two joint-tenants be of a rent, and one of them diſſeiſe the tenant of the Land, this is a ſeverance of the jointure for a time, for the molty of the rent is ſuſpended by unity of poſſeſſion, and therefore cannot ſtand in jointure with the other moity in poſſeſſion, *Pl. Com.* 419.

Nihil de re accreſcit ei, qui in re quando jus accreſceret habet. A State of Freehold cannot ſtand in jointure with a term for years: nor a reverſion upon a Freehold, with a Freehold and inheritance in poſſeſſion. Neither can a ſeiſin in the right of a politick capacity ſtand in jointure with ſeiſin in a natural capacity. 37 *H.* 8. 8. 3 *E.* 4. 10. *Fo.* 188. a. *Vide, &c.*

In all caſes where the joint-tenants purſue one joint remedy and the one is ſummoned and ſevered, and the other recover, he that is ſummoned, *&c.* ſhall enter with him: but where their remedies be ſeveral, there the one ſhall not enter

ter with the other till both have recovered. *Littleton* cap. *Remitt.* the laſt caſe. If Lands be demiſed for life, the remainder to the right heirs of *J. S.* and of *J. N. J. S.* hath iſſue and dieth, and after *J. N.* hath iſſue and dieth, the iſſues are not joint-tenants; for the one moity veſted at one time, and the other at another time, 24 *E.* 3. 29. And yet in ſome caſes there may be joint-tenants, and yet the eſtate may veſt in them at ſeveral times. As if a man make a feoffment in Fee to the uſe of himſelf, and of ſuch wife as he ſhould afterwards marry, for terms of their lives, and after he taketh wife, *&c.* 17 *El. Dyer*, Brent's c.

CHAP. IV.

Of Tenants in Common.

Sect. 292.

JOint-tenants have the Lands by one joint title, and in one right; but Tenants in Common by ſeveral titles, or by one title and by ſeveral rights, which is the reaſon that joint-tenants have one joint freehold, and Tenants in Com. have ſeveral freeholds, onely this property is common to them both, *viz.* that their occupation is individed, and neither of them knoweth his part in ſeveral. *Vide Sect.* 296.

Addition probat minoritatem.

If Lands be given to two Biſhops (or to two Abbots) to have and to hold to them two and their ſucceſſors; in reſpect of their ſeveral capacities, albeit the words be joint, yet the Law doth adjudge them to be ſeverally ſeiſed. *Vide Sect.* 200. 7 *H.* 7. 9. *b.* 16 *H.* 7. 15. *b.* 10 *E.* 4. 16. *b. Fo.* 189 *b.* 190 *a.*

If a Corody be granted to two men and their heirs, becauſe the Corody is incertain and cannot be ſevered, it ſhall a-

mount

mount to a ſeveral grant to each of them one Corody; for the perſons be ſeveral, and the Corody is perſonal.

Sect. 297.

If Lands be given to *J.* Biſhop of *N.* and his ſucceſſors, and to *J. Overl.* Doctor of D. and his heirs being one and the ſame perſon, he is Tenant in Common with himſelf, 13*H.*8.14.

But our Authours rules do not hold in Chattels reals, or perſonals: for if a Leaſe for years be made, or a ward granted to an Abbot and a ſecular man, or to a Biſhop and ſecular man, or if goods be granted to them, they are joint-tenants, becauſe they take not in their politique capacity. An expreſs Eſtate controlls an implyed Eſtate. *Si home ſei de cert. terre infeoffe un aut. del moity de m. la terre, &c.* Such a feoffment is good by parol without writing, and ſuch an uncertain Eſtate ſhall paſs by livery, 21*E.*4. 22. *b.* 10*El. Dyer* 28. 33 *H.* 6. 5. *a. vide Sect.* 299. *fol.* 190. *b. quære, &c.*

Sect. 301.

Expreſſio eorum quæ tacitè inſunt nihil operatur.

In caſe of Leaſes for life it is more beneficial for the Leſſor to have the Jointure ſevered than to have it continue.

Ubi eadem ratio, ibi idem jus eſſe debet, for, *ratio eſt anima legis & ratio poteſt allegari deficiente lege.* But it muſt be *ratio vera & legalis & non apparens. Arg. à ſimili,* is good in Law, *ſed ſimilitudo legalis eſt caſuum diverſor' int. ſe collatorum ſimilis ratio, Quod in uno ſimilium valet, valebit in altero, Diſſimilium Diſſimilis eſt ratio.*

Sect. 302.

Two joint-tenants, *ſi lun de eux leſſa ceo que a luy affiert a un aut. pur terme de ſa vie, per tiel Leaſe le franktenement ē ſever de le jointure, & per ceſt le reaſon le reverſion que ē dependant ſur in le franktenement ē ſever del jointure & ſi leſſor mor. vivant leſſee pur vie le reverſion diſcenda al heire del leſſor, & nemy devienda a lauter joint. jointenant per le ſurvivor.*

Un

Un franktenement ne poit per nature de jointure eſtre anex a un reverſion, &c. fo. 191. b. *Vide, &c.*

If two joint-tenants be of a Leaſe for 21 years, and the one letteth his part for certain years part of the term, the jointure is ſevered, and ſurvivor holdeth not place, for a term for a ſmall number of years is as high an intereſt, as for many more years. *Hil.* 18 *Eliz. Com. Banco.*

If two joint-tenants make a Leaſe for life reſerving a rent to one of them, the rent ſhall enure to them both, becauſe the reverſion remains in jointure, unleſs the reſervation be by Deed indenture, and then he onely to whom it is reſerved ſhall have it. *fo.* 192. *a. quæ.* 27 *H.* 8. 16. *a.* 7 *E.* 4. 25. *vide lib. &c.*

And ſo it is if ſuch a Leſſee for life ſhould ſurrender to one of them, it ſhall enure to them both, for that they have a joint reverſion. But if the Leſſee grant his eſtate to one of them, no part of it ſhall enure to his companion, becauſe for the moity belonging to his companion, it is in eſſe in him to whom the grant is made, the reverſion to the other in fee, 5 *E.* 4. 4. 38 *H.* 6. 24. b.

2. *Jointenants ſont leaſe pur vie remainder a ſon comp. in fee, ceo ē bon remainder de ſon moity & al on comp.*

Sect. 303.

If the jointure be ſevered at the time of the death of him that firſt deceaſed, the benefit of ſurvivor is deſtroyed forever, *vide S.* 291.

Two joint-tenants in fee, and the one letteth his part to another for life of the Leſſor, and the Leſſor dieth, ſome ſay that his part ſhall ſurvive, *&c.* for by his death the leaſe was determined; and others hold the contrary, for that at the time of his death the jointure was ſevered, for ſo long as he lived the leaſe continued. And ſecondly, that notwithſtanding the act of any one of the joint-tenants, there muſt be equal benefit of ſurvivor, as to the freehold. But here if the other joint-tenant had firſt died, there had been no benefit of ſurvivor to the leſſor without queſtion, *f.* 194. *Vide & not a.*

Sect.

Sect. 304, 305.

If two joint-tenants be of 20 acres, and the one make a Feoffment of his part in 18 acres, the other cannot releaſe his entire part, but onely in two acres, for that the jointure is ſevered for the reſidue.

Nota, upon a Releaſe that creates, or inlargeth an eſtate, or enures by way of *Mitter le eſtate*, a rent may be reſerved, but not upon a releaſe that enureth by way of *Mitter le droit*, or which enures by way of Extinguiſhment, *fol.* 193. b.*

Of a releaſe enuring by way of Extinguiſhment made to the husband, the wife ſhall take benefit, or to the wife the husband ſhall take benefit. But otherwiſe it is of a Releaſe which enures by way of *Mitter l' eſtate.** 10 *E.* 4. 3. b. 21 *H.* 6. 8. b.*

En aſcun caſe un releaſe vera de mitter tout le drent que il que fert le releaſe ad celuy a que le releaſe ẽ fait. Vide S. 306. *f.* 194. a.

An uſurpation ſhall work a Remitter to one that hath a former Right, *F. N. B.* 35. Right and Wrong cannot conſiſt together, 194. a.

Sect. 307.

Et en aſc' caſe un releaſe vera per voydextinguiſment & aydera le joyntenant a que le releaſe ne fuit fert, &c. ſicome un home ſoit diſſeiſee, & le diſſeiſor fert feoffment a 2. *homes in fee, ſi le diſſeiſee releaſe per ſon fert a un des feoffees cel releaſe vera a ambideux, &c. pur ceo que les feoffees ont eſtate per la ley ſcil. per feoffment & nemy per tort fert a nulluy. & &c.*

The reaſon of the diverſity between the diſſeiſſors, and their feoffees, is for that the feoffees coming in by Title and Purchaſe, are intended in Law to have a Warranty (which is much eſteemed in Law, and therefore leſt the Warranty ſhould be avoided, the Releaſe ſhall enure to both the feoffees in favour of purchaſors, and ſo the right and benefit of every one ſaved. And therefore in ancient time if the feoffee of a diſſeiſor had continued in ſeiſin quietly a year and a day, the entry of the diſſeiſee had not been Lawfull upon him, 20 *H.* 3. *Aſſ.* 432.

Sect. 311.

Note, that in real actions, and in actions alſo that are mixt with the perſonalty, Tenants in common ſhall ſever, becauſe they have ſeveral Freeholds, *&c. Come ſi 2 tenants in common ſont diſſeiſees, ils doient aver 2. Aſſ. pur ceo que ils fueront ſeiſees per ſeveral titles, &c. Vid. li. f.* 195. *b. Auterment eſt de jointenants.*

Sect. 313.

Quant a ſuer des actions que touchant le realty, y ſont diverſities perenter parceners que ſont eins per divers diſcents & tenants in common. Vide Sect. 241.

Sect. 314.

If two Tenants in common be, and they grant a rent of 20 *s. per annum* out of their Land, the Grantee ſhall have two rents of 20 *s. Pl. Com. Hill.* and *Grange*'s Caſe, 171. *vide Sect.* 219.

But if they two make a gift in tail, a Leaſe for life, *&c.* reſerving 20 *s.* rent to them and their heirs, they ſhall have but one 20 *s.* for they ſhall have no more than themſelves reſerved. And albeit the reſervation of rents ſeverable be in joint words, yet in reſpect of the ſeveral reverſions the law makes thereof a ſeverance, *fol.* 197. *a.*

Lex ſpectat naturæ ordinem, vide Sect. 129. *& lex neminem cogit ad vana ſeu inutilia*, lib. 5. fol. 21.

The law wills that in every caſe where a man is wronged and endamaged, that he ſhall have remedy.

Aliquid conceditur, ne injuria remaneret impunita quod alias non concederetur, 31 *E.* 3. 35. 3 *E.* 3. 19. *a.*

Tenants in common ſhall join in a *Qu. imp.* becauſe the Preſentation to the Advowſon is entire, 5 *H.* 7. 8. 33 *H.* 6. 11. 6 *E.* 4. 10.

Alſo Tenants in common of a Seigniory ſhall join in a Writ of Right of Ward, and Raviſhment of Ward for the body, becauſe it is intire, 6 *H.* 4. 6, 7.

If

If two Tenants in common be of the Wardſhip of the body, and one doth raviſh the Ward, and the one Tenant in common releaſes to the Raviſher, this ſhall goe in benefit of the other Tenant in common, and he ſhall recover the whole, and the releaſe ſhall not be any bar to him. And ſo it is if two Tenants in common be of an Advowſon, and they bring a *Qu. imp.* and the one doth releaſe, yet the other ſhall ſhew forth and recover the whole Preſentment.

Two Tenants in common ſhall join in a Detinue of Charters, and if one be Nonſuit, the other ſhall recover.

It is ſaid that Tenants in common ſhall join in a *Warr. Chartæ*, but ſever in Voucher, 18 *E.* 3. 56.

Sect. 315.

Item Tenants in common averont un action joint-tenement, & recoveront joint tenement lour damages, quant l' action eſt en le perſonalty & nemy en le realty, &c.

Note, a diverſity between a Chattel in poſſeſſion, and a perſonal choſe in action belonging unto them: As if two Tenants in common be of Land, and one doth a treſpaſs therein, of this action they are joint-tenants, and the ſurvivor ſhall hold place, 22 *H.* 6. 12. *S.* 319, 320.

But if two Tenants in common be of goods, as of an horſe, *&c.* there if one die his Executor ſhall be Tenant in common with the ſurvivor, *fol.* 198. *a.*

If two Tenants in common be of an Advowſon, and a ſtranger uſurp, ſo as the right is turned to an action, and they bring a Writ of *Qu. imp.* which concerns the realty, the ſix months paſs, and the one dieth, the Writ ſhall not abate, but the ſurvivor ſhall recover, otherwiſe there ſhould be no remedy to redreſs this wrong. And ſo it is of Coparceners, and this is one exception out of our Authours rule, 14 *H.* 4. 12. 38 *E.* 3. 5. 37 *H.* 6. 9. *b.* 10 *El. Dyer* 279. *F. N. B.* 35. *Pl. Com.* Seigneur *Barkley's* Caſe.

But if three Coparceners recover land and damages in an Aſſize of *Mordanc'* albeit the judgment be joint, that they ſhall recover the land and the damages, yet the dama-

ges being acceſſory, though they be perſonal do in judgment of Law depend upon the Freehold, being the Principal, which is ſeveral. And though the words of the judgment be joint, yet ſhall it be taken for diſtributive: And therefore if two of them die, the entire damages do not ſurvive, but the third ſhall have Execution according to her portion, and this is another Exception, 14 *E.* 3. *Execution* 75. 45 *E.* 3. 3. b. But if all three had ſhewed Execution by force of an Elegit, and two of them had died, the third ſhould have had the whole by ſurvivor, till the whole damages be paid.

Sect. 317, 318.

En avowry pur rent tenants en common covient ſever, car ce ë en le realty, come le Aſſ. ë ſupra.

Tenants en common poient bien faire partition enter eux ſils voilont, &c.

Sect. 321.

Lou divers perſons ont chateux reals ou perſonals en comun, & pur divers Titles, ſi lun de eux mor' ſes executors tiendrant & occupier. ceo oveſque eux que ſurveſquont, &c.

Sect. 322, 323.

Albeit one Tenant in common take the whole profits, the other have no remedy in Law againſt him, for the taking of the whole profits is no Ejectment: but if he drive out of the land any of the Cattel of the other Tenant in common, or not ſuffer him to enter and occupy the land, this is an Ejectment, *&c.* Whereupon he may have an *Eject. firme* for the one moity, and recover damages for the entry, but not for the mean profits, *fo.* 199. *b.*

Note a diverſity between actions which concern Right and Intereſt (as of *Eject' firme*, *Eject' de gard*, *quare ejecit infr. Term.* of a Chattel real upon an expulſion or Ejectment) and actions concerning the bare taking of the profits

fits riſing out of the Land, or doing of Treſpaſs upon the land, as here by the Examinations do appear, for the right is ſeveral, and the taking of the profits in common, 21 *E.* 4. 11. 22. 22 *H.* 6. 50. 58. 10 *H.* 7. 16. *F. N. B.* 117. a.

The ſecond diverſity is between Chattels reals that are apportionable or ſeverable, as Leaſes for years, Wardſhip of Lands, Intereſt of Tenements by Elegit, Statute Merchant, Staple, *&c.* of Lands and Tenements; and Chattels reals entire, as Wardſhip of the Body, and a Villain for years, *&c.* for if one Tenant in common take away the Ward or Villain, *&c.* the other hath no remedy by action, but he may take them again.

Another diverſity is between Chattels reals and Chattels perſonals; for if one Tenant in common take all the Chattels perſonals, the other hath no remedy by action, but he may take them again. And herein the like Law is concerning Chattels reals entire, and Chattels perſonals for this purpoſe. But of Chattels entire, as of a Ship, Horſe, or any other entire Chattel real or perſonal, no ſurvivor ſhall be between them that hold them in common, 10 *H.* 4. *Treſpaſs* 178. 11 *H.* 4. 3.

And Tenants in common ſhall not join in an *Ejectione firmæ &c.* for that ſuch actions concern the Right of Lands which are ſeveral. 21 *E.* 4. 11, 12. *fo.* 200. a.

If two Tenants in common be of a Dove-houſe, and the one deſtroy the old Doves, whereby the flight is wholly loſt, the other Tenant in common ſhall have an action of Treſpaſs, and he cannot plead in Bar Tenancy in common, 47 *H.* 3. 22. b.

And ſo it is if one Tenant in common, *&c.* deſtroy all the Deer in a Park, *&c.* 4 *E.* 2. *Treſpaſs* 233.

And ſo it is, if one Tenant in common carry away the meer ſtones, *&c.* 1 *H.* 5. 1. 2 *H.* 5. 3. And if two Tenants in common be of a folding, and the one of them diſturb the other to erect Hurdles, *&c.* 13 *E.* 3. *Treſpaſs* 212. 18 *H.* 6. 3.

If two ſeveral owners of Houſes have a River in com-

mon, *&c.* if one of them corrupt the (Water) River, the other ſhall have an action upon his Caſe, 13 *H.* 7. 26.

If two Tenants in common or joint-tenants be of an houſe or Mill, and it fall in decay, and the one is willing to repair the ſame, and the other will not, he that is willing ſhall have a Writ *de reparatione fac. pro bono publico*, *F. N. B.* 127.

All thoſe Books which affirm that an action of Account lieth by one Tenant in common or joint-tenant againſt another, muſt be intended, when the one maketh the other his Bayliff, for otherwiſe never his Bayliff to render an Account is a good plea: *F. N. B.* 118. 1. 10 *H.* 7. 16. 2 *E.* 4. 25. *Weſt.* 2. cap. 23.

If there be two Tenants in common of a Wood, Turbary, Piſcary, *&c.* and one of them doth Waſte againſt the will of his companion, his companion ſhall have an action of Waſte. *vide lib. fo.* 200. *b. & Nota.*

Some do hold that an action of Waſte doth not lie upon the Statute *W.* c. 23. againſt Tenant in common, *&c.* for deſtroying the whole flight of Doves, 47 *E.* 3. 22. 50 *E.* 3. 3.

Note, that one Tenant in common may infeoff his companion, but not releaſe, becauſe the Freehold is ſeveral. Joint-tenants may releaſe, but not infeoff, becauſe the Freehold is joint: but Coparceners may both infeoff and releaſe, becauſe their ſeiſin to ſome intents is joint, and to ſome ſeveral.

Sect. 324.

Quant un home voile merrer un feoffment fait a luy, ou un doun en tail, ou leaſe pur voie d' aſcun terres, &c. la il dirra par force de quel feoffment, &c. il fuit ſeiſee, &c. Mes lou un voile pleal un leaſe ou grant fait a luy de chattel real ou perſonal, la il dirra, per force de quel il fuit poſſeſſe, &c.

When a man pleads a leaſe for life, *&c.* which paſſeth by livery, he is not to plead an entry, for he is in actual ſeiſin by the livery it ſelf. Otherwiſe it is of a leaſe for years.

CHAP.

CHAP. V.

Of Eſtates ſur Condition.

Sect. 325.

CONditio dicitur cum quod in caſum incert' qui poteſt tendere ad eſſe aut non eſſe confertur.

Condic' eſt 2^ex
1. *Facti, i. e.* upon a condition expreſſed by the party in legal terms of Law.
2. *Juris i. e. Tacitè* created by Law, without any words uſed by the party.

Littleton ſubdivideth Condition in Deed, into Condition precedent (of which it is ſaid, *Condic' adimpleri debet, priuſquam ſequatur effectus*) and Condition ſubſequent.

Again, of Condition in Deed, ſome be Affirmative and ſome Negative, and ſome in the Affirmative which imply a Negative. Some make the Eſtate whereunto they are annexed, voidable by Entry or Claim, and ſome make the Eſtate void *ipſo facto* without entry, *&c.* Alſo of Condition in Deed, ſome be annexed to the rent reſerved out of the land, and ſome to collateral acts, *&c.* ſome be ſingle, ſome in the conjunctive, ſome in the disjunctive, *Mirror* cap. 2. 8. 15. 17. *fol.* 101. b.

Sur Condic' en fait ë, ſi come un home per fait indent. infeoffa un auter in fee render certain rent, &c. Here *Littleton* putteth one Example of ſix ſeveral kinds of Condition: 1. Of a * Condition * ſingle, in Deed. 2. Of a Condition ſubſequent to the Eſtate. 3. Of a Condition annexed to the rent. And 4. A Condition that defeateth, the Eſtate. 5. A Condition that defeateth not the Eſtate before entry. And 6. a Condition in the Affirmative which implyeth a Negative (as behind or unpaid implyeth a Negative) *viz.* not paid.

Bendloes en Treſpaſs, 5 Mar. *Et en ceſt caſe ſi le rent ne ſoit pay, &c.*

The Land is the principal debter, for the rent iſſueth out of the Land, and that is the place of demand, appointed by Law, and the demand muſt ever be made at the moſt notorious place; and the laſt time of demand of the rent is ſuch a convenient time, before the Sun-ſetting of the laſt day of payment, as the money may be numbred and received. 40 *Aſſ.* 11. 49 *Aſſ.* 5. 15 *El. Dy.* 329. *lib.* 4. *Burrough's* c. *f.* 72. *&c. Pl. Com.* 70. and 172. *Hill.* and *Grange's* c. *Lib.* 5. *f.* 114. *Wade's* c.

If a rent be granted payable at a certain day, and if it be behind and demanded that the grantee ſhall diſtrain for it, in this caſe the grantee need not demand it at the day, but if he demand it at any time after, he ſhall diſtrain for it. *Lib.* 7. *f.* 28. *Maunde's* caſe, *Mic.* 40, 41. *El. Stanly, &c.* Regularly it is true, that he that entreth for a condition broken ſhall be ſeiſed in his firſt eſtate, or of that eſtate which he had at the time of the eſtate made, *&c.* 8 *H.* 7. 7. b. 1. Limitation in reſpect of impoſſibility. 4 *H.* 6. 2. *Lib.* 8. *Fo.* 43, *&c. Whittingham's* c. 5. *H.* 7. *a.*

2. Limitation in reſpect of neceſſity: *Fo.* 202. *a. Vide, &c.*

3. In ſome caſes the Feoffor by his re-entry ſhall be in his former eſtate, but not in reſpect of ſome collateral qualities; as if a Copihold Eſcheat, and the Lord make a feoffment in Fee upon condition, and enter for the condition broken; for that the cuſtome or preſcription for the time is interrupted.

Lord and Tenant by Fealty and rent, the Lord is ſeiſed of his rent, and granteth his Seigniory to another in Fee upon condition, the Tenant attorn. and payeth his rent to the grantee, the condition is broken, the Lord diſtrains for his rent and reſcous is made, he ſhall be in his former eſtate, and yet the former ſeiſin ſhall not enable to have an *Aſſ.* without a new ſeiſin. 15 *Aſſ.* 12. Tenant in tail, It. Feoffment in Fee Sur. condition. 8 *H.* 7. 7.

If Tenant for life ſt. Feoffment, *&c.* and *ent. pur* condition broken, the ſtate is reduced, but the forfeiture is not purged. 43 *Aſſ.* 47. 13 *E.* 4. 4. *Seſſ.*

Sect. 327.

When the Feoffor is ſatisfied either by perception of the profits, or by payment, or tender and refuſal, or partly by the one, and partly by the other. *Fo.* 203.

The Feoffor by his re-entry gaineth no eſtate of freehold but an Intereſt by the agreement of the parties to take the profits in nature of a diſtreſs.

If a man make a Leaſe for life with a reſervation of a rent, and ſuch a condition, if he enter for the condition broken and take the profits of the Land *Quouſq. &c.* he ſhall not have an action of debt for the rent arere, for that the freehold of the Leſſee doth continue; and therefore the book (to the contrary, 30 *E.*3. *f.*7.) is falſe printed, and the true caſe was of a Leaſe for years.

Note a diverſity, *viz.* If a man make *Aleas pur ans.* reſerve a rent with a condition, that if the rent be behind, that the leſſor ſhall re-enter and take the profits untill thereof he be ſatisfied, there the profits ſhall be counted as parcel of the ſatisfaction, and during the time that he ſo taketh the profits he ſhall not have an action of debt for the rent. But if the condition be that he ſhall take the profits untill the Feoffor be ſatisfied, *&c.* without ſaying thereof, *&c.* There the profits ſhall be taken to be no part of the ſatisfaction, but to haſten the leſſee to pay it. 27 *H.* 8. 4. And as *Littleton* here ſaith, that untill he be ſatisfied, he ſhall take the profits in the mean time to his own uſe. 31 *Aſſ. pl.* 26. *Vide le ſtatute de Morton.* c. 6. and c. 7. without this word (inde.)

Sect. 329.

If a man by Indenture letteth Lands for years, provided always, and it is counted and agreed between the ſaid parties, that the leſſee ſhould not alien; it was adjudged that this was a condition by force of the proviſo, and a Covenant by force of the other words. *Vi.S.*220. *Dy.* 28 *H.*3. *f.*13. 27 *H.* 8. *f.*14.15. Seignior *Cromwel's* c. *Li.*2. *f.*71. *Li.*8.89. *Fran.* c.

Un Feoffment in Fee ë fait rendition rent, &c. Sur. condition, &c. en ceſt caſe leſtate del Feoffee ë defeaſible, ſi le condition ne ſoit performe, &c. vide Sect. 325.

Sect. 330.

Ineſſe poteſt donationis modus, conditio, ſive cauſa. Scito quod (ut) modus eſt, (ſi) condi. (quia) cauſa. 4 *Mar. Dyer* 138. *b.*

If a man grant an annuity *pro una acra terre*, this word *pro* ſheweth the cauſe of the grant, and therefore amounts to a condition; for if the acre of land be evicted by an elder title the annuity ſhall ceaſe, for *ceſſante cauſa ceſſat effectus*, 24 *E.* 3. 34. 9 *E.* 4. 20. 14 *E.* 4. 4. 15 *E.* 4. 2.

But if *A. pro concilio impenſo* make a Feoffment or a Leaſe for life, of an acre, or *pro una acra terræ, &c.* Albeit he denieth counſel, or that the acre be evicted, yet *A.* ſhall not reenter, for in this caſe there ought to be legal words of condition or qualification, for the cauſe or conſideration ſhall not avoid the ſtate of the Feoffee, and the reaſon of this diverſity, for that the ſtate of the land is executed, and the annuity is executory, *fol.* 204. *a. vide, &c.*

If a man make a Feoffment in Fee, *ad faciend.* or *faciend.* or *ea intentione* or *ad effectum*, or *ad propoſit.* that the Feoffee ſhall doe, or not doe ſuch an act, none of theſe words make the ſtate in the Land conditional, *Hill.* 18 *Eliz. in Com. Ban. Dyer* 138. *Pl. Com.* 142. *d. & ſt. lib.* 2. *c.* 34. It was adjudged *H.* 40 *Eliz. Rot.* 161. *Browne, &c.* That a Leaſe for years was but a contract, which may begin by word, and by word may be diſſolved, *Pl. Com.* 142. Sometime in caſe of Lands, *&c.* (*caſa*) ſhall make a condition; as if a woman give lands to a man and his heirs, *cauſa matrimonii prolocuti*, as if ſhe marry the man, or the man refuſe to marry her, ſhe ſhall have the land again to her and to her heirs. But otherwiſe it is if a man give lands to a woman, *&c.* For the man may and ought to ask adviſe of learned counſel, 34 *Aſſ.* 1. 5 *H.* 4. 1.

Quod non licebit, to the leſſee *dare, vendere, &c. Sub pœna forisfacturæ*, amounts to make the Leaſe for years defeaſible, 3 *E.* 6. *Dyer* 65, 66. 4 *Mar.* 138.

Sect.

Sect. 331, 332.

Quæ dubitationis cauſa tollendæ inſeruntur, communem legem non lædunt, & expreſſio eorum quæ, &c.

Mortgage, i. e. *mortuum vadium. Vivum vadium*, is,

As if a man borrow 100 *l.* of another, and maketh an Eſtate of Lands unto him, untill he hath received the ſaid ſum of the iſſues and the profits of the land, ſo as in this caſe, neither money nor land dieth or is loſt.

Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte quod ex ſuis proventibus acquiratur.

Sect. 334.

Feoffment ë fait en mortgage, le feoffor mor' devant le jour de payment des deiners, &c. Si l' heir del feoffor tender le mony al mes le jour, &c. & le feoffee ceo refuſe, &c. donques poit le heire enter en le terre, pur ceo que il ad intereſt de droit en le Condition, &c.

Et le feoffee en ceo caſe nad aſc' remedy daver le mony per le Common ley, Sect. 335.

The Condition deſcends unto the heir, and therefore the Law that giveth him an intereſt in the Condition, giveth him an ability to perform it; and hereby the intent of the Condition is performed, and the Feoffee doth receive no damage, *&c. fol.* 205. *b.*

The Executor or Adminiſtrator of the Mortgagor, or in default of them, the Ordinary may alſo tender, *Sect.* 337.

If the Condition annexed to lands, be poſſible at the making of the Condition, and become impoſſible by the act of God, yet the ſtate of the Feoffee, *&c.* ſhall not be avoided. *Pl. Com.* 456. *Wroth*'s Caſe. 14*H.*7.3. 15*H.*7.1. 14*E.*4.3.

But where a Condition of a Bond, Recognizance, *&c.* is poſſible at the making of the Condition, and becomes impoſſible by the act of God, or of the Law, or of the Obligee, *&c.* there the Obligation, *&c.* is ſaved, and the reaſon of the diverſity, becauſe the ſtate of the land is executed, and ſetled

in the Feoffee, and cannot be redeemed back again but by matter ſubſequent, *viz.* the performance of the Condition. But the Bond, *&c.* is a thing in action, and executory, whereof no advantage can be taken, untill there be a default in the Obligor, 15 *H.* 7. 18. 9 *El.* 262. *Dyer Li.* 5. 22. *Laughter's* Caſe. 38 *H.* 6. 2. *Brit.* c. 36. *f.* 89, 99, 114, 130.

But if the condition of a Bond, *&c.* be impoſſible at the time of the making of the condition, the Obligation, *&c.* is ſingle. And ſo it is of a Feoffment in Fee with a condition ſubſequent, that is impoſſible, the ſtate of the Feoffee is abſolute; but if the condition precedent be impoſſible, no ſtate or intereſt ſhall grow thereupon, 14 *H.* 8. 28. 10 *H.* 7. 22. 5 *Eliz. Dyer* 222. *Pl. Com.* 22. 272. *Fuller's* Caſe. *fol.* 206. b.

If *A.* be bound to *B.* that *J. S.* ſhall marry *J. G.* before ſuch a day, and before the day *B.* marry with *Ja.* he ſhall never take advantage of the Bond, for that he himſelf is the mean, that the condition could not be performed, 4 *H.* 7. 4. 30 *H.* 8. *Dyer* 42.

The Law diſtinguiſheth between a Condition againſt Law for the doing of any act that is *malum in ſe*, and a Condition againſt Law, that is either repugnant to the State, or againſt ſome Maxime or Rule in Law: As

1. If a man be bound upon Condition, That he ſhall kill *J. S.* the eſtate is abſolute, and the Condition void, 4 *H.* 7. 4. But if a man make a Feoffment in Fee upon Condition, that the Feoffee ſhall kill *J. S.* the eſtate is abſolute, and the Condition void, *Pl. Com.* 133. *Browning's* Caſe.

2. If a man make a Feoffment, *&c.* that he ſhall not alien (or that the Feoffee ſhall not take the profits, *&c.*) this Condition is repugnant and againſt Law, and the State of the Feoffee is abſolute. But if the Feoffee be bound, *&c.* that he or his heirs ſhall not alien, this is good, for he notwithſtanding alien if he will forfeit his Bond, *&c.* 20 *Ed.* 4. 8. 21 *H.* 7. 11. 30. 27 *H.* 8.

Albeit a convenient time before Sun-ſet be the laſt time given to the Feoffor to tender, yet if he tender it to the perſon

perſon of the Mortgagee at any time of the payment, and he refuſeth it, the Condition is ſaved for that time, *Vide S.* 325.

Guardian in Socage may tender in the name of the heir, becauſe he hath an intereſt, *&c. Vide S.* 401. *Hill.* 28. *El. in Banco Reg. inter Watkins.*

If the Mortgagee accept of a ſtrangers tender in the name of the Mortgager, *&c.* this is good, *&c.*

Omnis ratihabitio retro trahitur, & mandato æquiparatur, 36 *H.* 6. *tit. Barre* 166.

Sect. 335.

The Obligor tenders the money at the day, *&c.* and the Obligee refuſeth the ſame, yet in an action of Debt upon the Obligation, if the Defendant plead the tender, *&c.* he muſt alſo plead that he is yet ready to pay the money and tender the ſame in Court. But if the Plaintiff will not then receive it, but take iſſue upon the tender, and the ſame be found againſt him, he hath loſt the money for ever, 22 *H.* 6. 39. *lib.* 9. *fol.* 79. *H. Peytoe's* Caſe.

And the reaſon wherefore the money is not loſt by the tender and refuſal, is not onely for that it is a duty and parcel of the Obligation, but alſo for that the Obligee hath remedy by Law for the ſame.

Liberata pecunia non liberat offerentem, 8 *E.* 2. *tit. Aſſize, Aſſ.* 389.

When the Condition is collateral to the Obligation, a tender and refuſal is a perpetual barre, 7 *H.* 4. 18. 5 *Mar. Dyer* 150. 21 *E.* 4. 25. 31 *Aſſ.* 25. *Pl. Com. fol.* 6.

Obligor makes a leaſe and a releaſe to the Obligee, and his heirs, this amounts in Law to a feoffment; and albeit this be a Collateral Condition, yet it is well performed.

Cuna dicitur à cudendo, of Coining, *&c.* In French, *Coin* ſignifieth a Corner. Some ſay that *Coine dicitur à κοινὸς, i. e. Communis, quod ſit omnibus rebus communis. Moneta dicitur à monendo*, not onely becauſe he that hath it, is to be warned providently to uſe it, but alſo becauſe *Nota illa de authore*

&

& valore admonet. lib. 5. fol. 114. Wade's Caſe, *lib. 9. fo. 78.*

Pecunia dicitur à pecu. Omnes en. veterum divitiæ in animalibus conſiſtebant. Ariſt. l. 5. c. 8.

Nummus ἀπὸ τῦ νόμυ *quia lege ſit non natura,* 9 *Hen. 5. Stat. 2. cap. 7.*

Sect. 336, *&* 337.

Note, he that hath intereſt in the Condition on the one ſide, or in the Land on the other, may tender, *fol.* 207. *b. & vide Sect.* 334.

Auxi en caſe de Mortgage, ſi nul jour de payment ſoit limit, & le feoffor mor. &c. donques le temps de le tender eſt pas.

Note divers diverſities.*

1. Between a Feoffment in Fee with Condition for the payment of a ſum of money, where no time is limited; and the Condition of a Bond, *&c.* 21 *E.* 4. 38. *b.*

2. Between a Condition of an Obligation, which concerns the doing of a tranſitory act without limitation of any time as payment of money, delivery of Charters, *&c.* for there the Condition is to be performed preſently, *i. e.* in convenient time; and when by the Condition of the Obligation the act is local, for there the Obligor hath time during his life to perform it, as to make a Feoffment, *&c.* if the Obligee doth not haſten the ſame by requeſt.

3. In caſe where the Condition is local, when the concurrence of the Obligor and the Obligee is requiſite) as in the ſaid caſe of the Feoffment) and when the Obligor may perform it in the abſence of the Obligee, as to acknowledge ſatisfaction in Court of King's Bench, for there he muſt doe it in convenient time.

4. Where the Condition concerneth a tranſitory or local act, and is to be performed to the Feoffee or Obligee, and where it is to be performed to a ſtranger: As if *A.* be bound to *B.* to pay 10. *l.* to *C. A.* tenders to *C.* and he refuſeth, the Bond is forfeit. But if the act had been by the Condition to be made to the Obligee, or to any other for his benefit a tender,

tender, *&c.* ſhall have the benefit, becauſe he himſelf is the cauſe that the Condition could not be performed, 22 *E.* 4. 13. 10 *H.* 7. 14. *b.* 35 *H.* 8. *Dyer* 56. *lib.* 5. *fo.* 23. *Lambe's* c. *8 *E.* 4. 14.

5. Between a Condition of an Obligation and a Condition upon a Feoffment, where the act that is local is to be done to a ſtranger, and where to the Obligee or Feoffor himſelf: for the ſtranger ſhall be infeoffed as ſoon as conveniently may be, otherwiſe it is of the Feoffor, *&c.* for the privity of the Condition, *&c. lib.* 6. *fo.* 31. *Boothie's* Caſe, *l.* 2. *fo.* 79. *b.* Seignior *Cromwel's* Caſe. 21 *E.* 4. 41. 2 *E.* 4. 3, 4. 4 *E.* 4. 4. *b.* 26 *H.* 8. 9. *b.*

6. When the Obligor or Feoffor is to infeoff a ſtranger as hath been ſaid, and when a ſtranger is to infeoff the Feoffee or Obligee: As if *A.* infeoff of black acre, upon Condition, that if *C.* infeoff *B.* of white acre, *A.* ſhall re-enter, *C.* hath time during his life, if *B.* doth not haſten it, *&c.* and ſo of an Obligation, *fo.* 108. *b.*

7. But in ſome caſes albeit the Condition be collateral, and is to be performed to the Obligee, aud no time limited, yet in reſpect of the nature of the thing, the Obligor ſhall not have time during his life to perform it. As if the Condition of an Obligation be, To grant an Annuity to the Obligee during his life, payable at Eaſter; this Annuity muſt be granted before Eaſter, *&c. Dyer* 14 *Eliz.* 311.

8. When the Obligor, Feoffor or Feoffee, or a ſtranger *&c.* is to doe a ſole act, as to go to *Rome, &c.* they have time during life, *&c.*

The Executor, *&c.* may (when a man is limited) pay the money, *vide S.* 334. *l.* 5. *f.* 96, 97. *Goodale's* Caſe.

If I infeoff one in Fee upon Condition to make a gift in tail to *J. S.* and he refuſeth it, and a tender and refuſal is made, there the Feoffor ſhall not re-enter, for it was intended, that the Feoffee ſhould have an eſtate in the land. And ſo it is if the Condition be, That the Feoffee ſhall grant a rent charge to a ſtranger, 2 *Edw.* 4. *Enter Congeable* 25.

But otherwiſe it is if the Condition be to infeoff *J. S.* and his

his heirs, and a tender and refuſal is made, *&c.* 19 *H.* 6. 34.

When the Executors make a tender, and the Feoffee refuſeth, albeit the heir (who hath a Title of Entry) be a third perſon, yet is he no ſtranger, but he and the Executors alſo and privies in Law. Concerning goods and Chattels, either in poſſeſſion or in action, the Executor doth more actually repreſent the perſon of the Teſtator; than the heir doth the perſon of the Anceſtor. For if a man bindeth himſelf, his Executors are bound, though they be not named, but ſo it is not of the heir.

Sect. 338, 339.

En touts caſes de Condition de payment de certain ſum en groſs touchant terres, &c. ſi loial tender ſoit un ſoits refuſe, celuy que doit le tender mony è de ceo aſſouth & diſcharge pur touts temps apres; i. e. for ever to make any other tender, but if it were a duty before, though the Feoffor enter by force of the Condition, yet the debt or duty remaineth: As if *A.* borrow 100 *l.* of *B.* and after Mortgage Land to *B.* and he refuſe it, *A.* may enter, *&c.* and the Land is freed for ever of the Condition; but yet the debt may be recovered by action, *&c.* But if *A.* without any loan, debt or duty preceding, infeoff *B.* of land upon Condition for the payment of 100 *l.* to *B.* in nature of a graruity or gift; in that caſe if tender be made, and he refuſe, *B.* hath no remedy therefore, *fol.* 209. b. *Vide Lib. &c.*

The Agreement precedent doth guide the payment ſubſequent, and the payment ought to be real, and not in ſhew or appearance, 18 *E.* 4. 18. 19 *H.* 6. 54. 20 *E.* 3. *Accounts* pag. 70.

If the Condition upon Mortgage be, To pay to the Mortgagee or his heirs the money, *&c.* and before the day of payment the Mortgagee dieth, the Feoffee cannot pay the money to the Executors, *&c.* for, *In hoc caſu deſignatio unius perſonæ eſt excluſio alterius, & expreſſum facit ceſſare tacitum, Lib.* 5. *&c. Dyer* 2 *Eliz.* 181. 44 *E.* 3. 1. *b. ſo.*

If a man make a Feoffment in Fee upon Condition, That

If

if the Feoffor pay to the Feoffee his heirs or aſſigns 20 *l.* before ſuch a Feaſt, and before the Feaſt the Feoffee maketh his Executors, and dieth, the Feoffor ought to pay the money to the heir, and not to the Executors, for the Executors in this caſe are no Aſſignees in Law. And the Feoffee hath an eſtate in the Land which he may aſſign over, and where there may be Aſſignees in Deed, the Law ſhall never ſeek out, or appoint any Aſſigns in Law, 27 *H.* 8. 2. 4 *Mar.* 140. *a. M.* 23, 24. *El. in Curia Wardorum inter Randall & Browne.* 2 *El. Dyer* 181. *Pl. Com. Chapman's* Caſe. 186. 188. 17 *Aſſ. Pl.* 1.

Sect. 340.

Comment aſcun. ont dit que le feoffor è tenus de tender, &c. ſur la terre tenus in Mortgage, pur ceo que le condition è dependant ſur le terre, uncore ceo ne prove que le feaſans de le condition deſte performe, covient erre fait ſur la terre, &c. & leſtate de la terre è dependant ſur la condition, &c.

The money is a ſum in groſs and collateral to the Title of the Land, and the Feoffor muſt tender the money to the perſon of the Feoffee, and it is not ſufficient for him to tender it upon the Land, 8 *E.* 4. 4. & 14. 11 *H.* 4. 62. 17 *Aſſ.* p. 2. 21 *H.* 7. *Kelway* 74. 16 *El. Dyer* 327. *l.* 4. *f.* 73. *Borough's* c. 21 *E.* 4. 6.

Otherwiſe it is of a rent that iſſueth out of the Land, 8 *E.* 4. 2.

But a Corporal ſervice is iſſuing out of Land, as Homage, *&c.* muſt be done to the perſon of the Lord, 21 *Aſſ.* 3. 7 *E.* 4. 4. 21 *E.* 4. 17. 19 *El. Dy.* 354. *lib.* 8. *fo.* 92. *France's* Caſe.

If *A.* be bound to *B.* with condition that *C.* ſhall infeoff *D.* on ſuch a day, *C.* muſt give notice to *D.* thereof and requeſt him to be on the Land at the day to receive the Feoffment, and he is bound to ſeek *D.* and to give him notice, 2 *E.* 4. 3. & 4.

Sect.

Sect. 341, 342.

Eſt diverſity quant al tender de le rent que ë iſſuant hors de la terre, & del tender davert ſum en groſſe que nem pas iſſuant, &c.

If the Condition be broken for non-payment of the rent, yet if the Feoffor bringeth an Aſſize for rent due at that time, he ſhall never enter, *&c.* becauſe he affirmeth the rent to have a continuance, and thereby waveth the Condition. And ſo it is if the rent had a clauſe of diſtreſs, *&c.* and the Feoffor had diſtrained for the rent, for non-payment whereof the Condition was broken, he ſhould never enter for the Condition broken, but he may receive that rent, and acquit the ſame, and yet enter, *&c.* But if he accept a rent due at a day after, he ſhall not enter, *&c.* becauſe he thereby affirmeth the leaſe to have a continuance, 14 *Aſſ.* 11. 45 *Aſſ.* 4 6 *H.* 7. 3. *Pl. Com.* 133. 22 *H.* 6. 57.

It will be a good and ſure thing, to ſet down in Conveyances every thing in certainty and particularity; and not to truſt onely to a Preſident, without advice of learned and well experienced men. For as the rule is concerning the ſtate of a man's body, *Nullum medicamentum eſt idem omnibus*; ſo in the ſtate and aſſurance of a man's Lands, *Nullum exemplum eſt idem omnibus*, fo. 212. *a.*

Sect. 343, 344.

Lou le lieu de payment eſt limit, le feoffee nem oblig. de receiver le payment en nul auter lieu, &c. Mes encore ſi il receivſt, &c. ceo eſt aſſets bone, &c.

The place is but a circumſtance, *&c.*

Nota diverſit. 1. When the Condition is for payment of money, there if the Feoffee or Obligee accept an horſe, *&c.* in ſatisfaction, this is good; but if the Condition were for the delivery of a horſe, *&c.* albeit the Obligee, *&c.* accept money, *&c.* for the horſe, *&c.* it is no performance of the Condition. The like law is if the Condition be to acknowledge a Recognizance of 20 l. if the Obligee or Feoffee accept

accept twenty pound in ſatisfaction of the Condition it is not ſufficient in Law, *&c.* And ſo it is of all other collateral Conditions, 3 *H.* 7. 4. *b.* 11 *H.* 7. 20, 21. 19 *E.* 4. 1. *b.* 22 *E.* 4. 24. *l.* 9. *f.* 78. 12 *H.* 4. 23.

2. When the money is to be paid to a ſtranger there if the ſtranger accept an horſe, or any collateral thing in ſatisfaction of the money, it is no performance of the Condition, becauſe the Condition is ſtrictly to be performed in that caſe. But if the Condition be, that a ſtranger ſhall pay to the Obligee, *&c.* a ſum of money, there the Obligee (being party, *&c.*) may receive a horſe, *&c.* in ſatisfaction. *l.* 5. *f.* 17. *Primel's* c.) **Vide* 4 *H.* 7. 4. *Dyer* 35 *H.* 8. 56. 27 *H.* 8. 1. If the Obligor or Leſſor pay a leſs Sum either before the day, or at another place than is limited by the Condition, and the Obligee* or Feoffee (*Leſſee) receiveth it, this is a good ſatisfaction. *Vide lib. f.* 212. *b.*

Sect. 345.

Un annuel rent reſerve al eſtranger, è ſum. engroſſe.

This reſervation is meerly void. l. 8. *fol.* 70, 71. words in a Condition ſhall be taken out of their proper ſenſe, *ut res magis valeat quam pereat.* 6 *E.* 2. *entr. Cong.* 55. *recipere.* 8 *Aſſ.* 34. *Revertere.*

But if *A.* be ſeiſed of certain Lands, and *A.* and *B.* join in a Feoffment in fee reſerving a rent to them both, and their heirs, and the Feoffee grant that it ſhall be lawfull for them and their heirs to diſtrain for the rent, this is a good grant of a rent to them both, becauſe he is party to the Deed, and the clauſe of diſtreſs is a grant of the rent to *A.* and *B.* but if B. had been a ſtranger to the Deed, then *B.* had taken nothing, and upon this diverſity are all the Books which *prima facie* ſeem to vary reconciled. 18 *E. Aſſ.* 381. 26 *H.* 8. 2. 31 *Aſſ. p.* 31. *Arg. a diviſione eſt fortiſſimum in lege. Sect.* 381.

Sect. 346, *&c.*

Nota 2. *choſes,* 1. *nul rent (que properment è dit rent) poit eſtr.*

eſtr. reſerve ſur aſc' Feoffment, done, ou leaſe, forſque tantſolement al Feoffor, donor, &c. ou a lour heires. 2. *Null emer, reenter (que ẽ tout un) poit eſtre reſerve, ne done a aſc' perſone forſque, &c. al Feoffor, &c. Littletons* meaning is, that either the Feoffor, *&c.* may reſerve the rent to himſelf onely, or to himſelf and his heirs. *Fo.* 213. b.

If a man make a Feoffment in Fee, reſerve a rent to him or his heirs, it is good to him for term of his life, and void to his heir. *l.* 5. *fo.* 111. *Mallorie's* Caſe.

If two joint-tenants without a Deed indenture make a leaſe for life reſerving a rent to one of them, it ſhall enure to them both, in reſpect of the joint reverſion, and ſo it is of a ſurrender, *&c.* 5 *E.* 4. 4. a. 27 *H.* 8. 16. *S.* 58.

But if Tenant for life, and he in the reverſion join in a Leaſe for life, or a gift in Tail by Deed reſerving a rent, this ſhall enure, to the Tenant for life onely, during his life, and after to him in the reverſion, for every one grants that which he may lawfully grant. *M.* 36 *&* 37 *El. in Banco R.*

Sect. 347.

Nothing in action, entry or re-entry can be granted over, for avoiding of maintenance, ſuppreſſion of right, and ſtirring up of ſuits. No ſtranger ſhall take advantage of a condition that requireth a re-entry.

But of limitations it is otherwiſe. As if a man make a leaſe *Quouſq; i. e.* untill *J. S.* come from *Rome*, the Leſſor grant the reverſion over to a ſtranger, *J. S.* comes from *Rome*, the grantee ſhall enter, becauſe the eſtate by the expreſs limitation was determined, *Pl. Com.* 27. *F. N. B.* 201. *l.* 10. *fo.* 36. *Mary Portingtons* Caſe.

2. Another diverſity is, between a condition annexed to a freehold, and condition annexed to a Leaſe for years; for a Leaſe for years may begin, or end without ceremony; but an eſtate of freehold cannot, *&c.* And of a void thing an eſtranger may take benefit, but not of a voidable eſtate by entry. 10 *Aſſ. pl.* 24. *Pl. Com.* 36. 11 *H.* 7. 17.

3. Di-

3. Diverſity between a reſervation of a rent, and a re-entry, for a rent cannot be reſerved to the heir of the feoffor, but the heir may take advantage of a Condition which the Feoffor could never doe; as if *J.* infeoff another of an acre of ground, upon Condition, that if mine heir pay to the Feoffee, *&c.* twenty ſhillings, that he and his heirs ſhall re-enter, this condition is good, *&c.* for he is privy in bloud, and ſhall injoy the land as heir to me. *Pl.* 313. *Scho.* 15 *E.* 4. 14. *a.*

And if a man have a Leaſe for years, and demiſe, or grant the ſame upon condition, *&c.* and die, his Executors or Adminiſtrators ſhall enter for the condition broken, for they are privy in right, and repreſent the perſon of the dead. *Vide* 21 *H.* 7. 18. *a. fo.* 214. *b. &c.*

If *Ceſty que uſe* had made a leaſe for years, *&c.* upon condition, the Feoffees ſhould not enter for the Condition broken, for they are privy in eſtate, but not privy in bloud. 27 *H.* 8. 1.

4. Diverſity is in caſe of a Leaſe for years, where the condition is that the Leaſe ſhall ceaſe or be void, and where the condition is that the leſſor ſhall re-enter, for there the grantee as *Littleton* ſaith, ſhall never take benefit of the condition: And note that where the eſtate or Leaſe is *ipſo facto* void, by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwiſe it is of an eſtate or Leaſe voidable by entry. *Pl.* 136. *Browning*'s Caſe.

5. Diverſity between condition in Deed, and condition in Law.

As if a man make a Leaſe for life, there is a condition in Law annexed unto it, that if the leſſee doth make a greater eſtate, *&c.* that then the Leſſor may enter of this and the like condition in law, which do give an entry to the Leſſor, the Leſſor himſelf and his heirs ſhall not onely take benefit of it, but alſo his Aſſignee and the Lord by eſcheat, every one for the condition in Law broken, in their own time.

6. Diverſity is between the judgment of the common Law, and the Law at this day by force of the Statute of 32. *H.* 8. *ca.* 34. for by the Commonlaw no grantee, or Aſſignee

of

of a reverſion could take advantage of a re-entry by force of a Condition. But now by the ſaid Statute, it is otherwiſe. By which act it is provided, that as well every perſon which ſhall have any grant of the King of any reverſion, *&c.* of any Lands, *&c.* which pertained to Monaſteries, *&c.* as alſo all other perſons being Grantees or Aſſignees, *&c.* to or by any other perſon or perſons, and their heirs, executors, ſucceſſors and Aſſignees, ſhall have like advantage againſt the Leſſees, *&c.* by entry for non-payment of the rent, or for doing of waſte, or other forfeiture, *&c.* as the ſaid Leſſors, or Grantors themſelves ought or might have had. 26 *H.* 6. *tit. entre-conge.* 49.

Upon this act divers judgments, *&c.* have been given, which are neceſſary to be known.

1. That the ſaid Statute is general, that the grantee of the reverſion of every common perſon, as well as of the King ſhall take advantage of Condition. *Pl.* 175. 76. *Hill.* and *Grange*'s caſe *M.* 10 and 11 *Eliz.* 180. *Dyer.*

2. That the Statute doth extend to grants made by the ſucceſſors of the King, albeit the King be onely named in the Act.

3. That where the ſtatute ſpeaketh of Leſſees, that the ſame doth not extend to gifts in Tail. 14 *El. Dyer* 309. *Winter*'s caſe.

4. That where the Statute ſpeaks of Grantees and Aſſignees of the reverſion, that an Aſſignee of part of the eſtate, of the reverſion may take advantage of the Condition. As if Leſſees for life be, *&c.* and the reverſion is granted for life, *&c.* So if Leſſee for years be, *&c.* and the reverſion, *&c.* the Grantee for years ſhall take benefit of the Condition in reſpect of this word execution) in the Act. *Pl.* 69. *Kidwelli*'s caſe, 7 *E.* 3. 54. and *Vide Dyer* 309.

5. That a Grantee of part of the reverſion ſhall not take advantage, *&c.* As if, the Leaſe be of three Acres, reſerving a rent upon Condition, and the reverſion is granted of two Acres, the rent ſhall be apportioned by the act of the parties, but the Condition is deſtroyed, for that it is entire, and a-

gainſt

gainſt common right. *lib.* 5. *fol.* 54. *Knight's* Caſe, *Winter's* Caſe, *&c.*

6. That in the King's Caſe, the Condition, *&c.* is not deſtroyed, *&c.*

7. By act in Law a Condition may be apportioned in the caſe of a common perſon, as if a Leaſe for years be made of two acres, one Burrough Engliſh, and the other at the Commonlaw, and the leſſor having iſſue two ſons dieth, each of them ſhall enter for the Condition broken, and likewiſe a Condition ſhall be apportioned by the act and wrong of the Leſſee, as in the Chap. of Rents. *l.*4. *f* 120. *Dumper's* Caſe.

8. If a Leaſe for life be made, reſerving a rent upon Condition, *&c.* the Leſſor levies a fine of the reverſion, he is Grantee or Aſſignee of the reverſion, but without atturnment he ſhall not take advantage of the Condition. *P.* 20. *El. in Com. Ba. Duke's* Caſe, *lib.*5. 112. *b. Mallorie's* Caſe.

9. Diverſity between a Condition that is cumpulſory, and a power of a revocation that is voluntary: for a man that hath a power of revocation, may by his own act extinguiſh his power, *&c.* in part, as by levying of a Fine of part, and yet the power ſhall remain for the reſidue, becauſe it is in nature of a limitation, and not of a Condition. *P.* 39. *El.* and 40, 41 *H.* Earl of *Salisburies* caſe in Court of Wards, 14 *El. Dy.* 39.

10. If the Leſſor bargain and ſell the reverſion by Deed indenture and inroll. the Bargainee is not in the *Per.* by the Bargainor, and yet he is an Aſſignee within the Statute.

So if the Leſſor grant the reverſion in Fee, to the uſe of *A.* and his heirs, *A.* is a ſufficient Aſſignee, *&c.* becauſe he comes in by the act and limitation of the party, albeit he is in the *Poſt*, and the words of the Statute be To, or By, and they be Aſſignee to him, although they be not by him: but ſuch as come in meerly by act in Law, as the Lord of the villain, the Lord by Eſcheat, *&c.* ſhall not take benefit of this Statute.

11. If the Leſſor bargain and ſell the reverſion, *&c.* Or make a Feoffment in Fee, and the Leſſee re-enter, the grantee

tee, or Feoffee ſhall not take advantage, *&c.* Without making notice to the Leſſee, *l.* 8. *f.* 92. *France*'s Caſe.

And 21. albeit the whole words of the Statute be for non-payment of the rent, or for doing of Waſte, *&c.* yet the Grantees and Aſſignees ſhall not take benefit of every Forfeiture *&c.* but onely of ſuch conditions as either are incident to the reverſion as rent, or for the benefit of the State, as for not doing of Waſte, for keeping the houſes in repair, for making of fences, ſcouring of ditches, for preſerving of woods, *&c.* and not for payment of any ſum in groſs delivery of corn, wood, *&c.*

So as other Forfeiture, ſhall be taken for other Forfeitures, like to thoſe examples which were there put, *(viz.)* of payment of rent, and not doing of Waſte, which are for the benefit of the reverſion, *Dyer* 309.

Sect. 348, 349.

Seign. & Tenant, & le tenant ſt. leaſe pur vierend rent, &c. & apres il mor. ſans heire, &c. Note, that the Lord by Eſcheat ſhall diſtrain for the rent, and yet the rent was reſerved to the leſſor and his heirs, but both Aſſignees in Deed, and Aſſignee in Law ſhall have the rent, becauſe the rent being reſerved of inheritance to him and his heirs, is incident to the reverſion, *&c.* The Guardian, *&c.* ſhall in the right of the heir take benefit of a Condition, by entry or re-enter, by the Commonlaw, 21 *H.* 7. 18. 17 *Aſſ.* 20. 18 *Aſſ. pl.* 18. *lib.* 7. *f.* 1. Earl of *Bedford*'s Caſe, otherwiſe it is of Aſſignees.

Si terre ſoit grant a un home pur 2. *ans ſur condition que ſil paſſoit al grantor deins les* 2. *ans* 10 *l. donques il averoit Fee, &c. Si livery de ſein. ſoit fait en ce caſe, donques le grantee avoit le franktenement & le Fee. ſur m. le condition.*

Note, Firſt, A condition precedent. 2. A condition which createth an eſtate may be made by parol without deed. 3. Livery, *&c.* in this caſe muſt be made before the leſſee enter; for after his entry livery made to him that is in poſſeſſion is void. 4. If no livery be made, no Fee Simple doth paſs. 5. It is inconvenient that the Fee ſhould paſs without li-

very

very, &c. 6. *Argumentum ab inconvenienti*, is forcible in law. *vide Sect.* 60. *f.* 216. *a.*

Sect. 350.

Si terre ſoit grant a un home pur terme de 5 *ans, ſur condition que ſil paya al grantor deins les* 2. *primer ans* 40 *M. que adonque il avant fee, ou auterment forſque pur les* 5 *ans, & livery eſt fait &c. per force del grant, ore il ad fee ſimple condition, &c.* Many are of opinion againſt *Littleton* in this caſe, and their reaſon is, becauſe the Fee ſimple is to commence upon a condition precedent, and therefore cannot paſs untill the condition be performed. And that *Littleton* here of a Condition precedent, doth (before performance) make it ſubſequent; and they avouch many Authorities, as 31 *E.* 1. *Feoffments & Faits* 119. 12 *E.* 2. *Voucher* 265. 7 *E.* 3. 10. *Pl. Com.* 272. *Saye's* Caſe. 44 *E.* 3. *Attaint* 22. 43 *Aſſ. p.* 41. 10 *E.* 3. 39, 40. 10 *Aſſ.* 15 *Aſſ.* 161. *Pl. Com.* 135. *Browning's* Caſe. 6 *R.* 2. *tit. quid juris clamat*, 20. And generally the Books are cited that make a diverſity between a condition precedent and a condition ſubſequent, 15 *H.* 7. 1. *a.* 14 *H.* 8. 18. 20. 3 *H.* 6. 6. *b.* And laſtly they cite *Dyer* 10 *El.* 281. and in *Say* and *Fuller's* Caſe. *Pl.* 272. the opinions of *Dyer* and *Brown*, *vide lib. fol.* 217. *a.*

Notwithſtanding all this, there are thoſe that defend the opinion of *Littleton*, both by Reaſon and Authority. By Reaſon, for that by the Rule of Law, a Livery of Seiſin muſt paſs a preſent Freehold, and cannot give a Freehold *in futuro*. 2. It cannot ſtand with Reaſon, that a Freehold ſhould remain in the leſſor, againſt his own Livery of Seiſin, ſeeing there is a perſon able to take it. A Livery of Seiſin cannot expect.

And they ſay farther, That ſeeing all the Books aforeſaid prove that ſuch a Condition is good, and that the Livery made to the leſſee is effectual, by conſequence the Freehold and Inheritance muſt paſs preſently, or not at all; and it is not rare, ſay they, in our Books, that words ſhall be tranſpoſed and marſhalled, ſo as the Feoffment or Grant may take

effect, *Pl.* 171. *Hill.* and *Grange*'s Caſe. 10 *El.* 3. *lib.* 8. *fo.* 74. Seignior *Stafford*'s Caſe. *Pl.* 487. *Nichol*'s Caſe.

And further they take a diverſity in this Caſe between a leaſe for life, and a leaſe for years. For in this caſe of a leaſe for life with ſuch a condition, to have Fee, they agree that the Fee ſimple paſſeth not before the performance of the Condition, for that the Livery may preſently work upon the Freehold: But otherwiſe it is in caſe of a Leaſe for years.

Alſo they take a diverſity between Inheritances that lie in grant, and that lie in livery, *f.* 217. *b.*

They alſo make ſeveral Anſwers to the Authority before cited: for as to the caſe in 31 *E.* 1. they ſay, That either the caſe is miſreported, or elſe the Law is againſt the judgment:

For the caſe is but this, That a man make a leaſe of a Manor to *B.* for 20 years, and after the twenty years *B.* ſhall hold the Manor to him and his heirs by 12 *l.* rent, and (as it muſt be intended) maketh Livery of Seiſin; in this caſe it is clear (ſay they) that *B.* hath a Fee ſimple maintenant, for there is no Condition precedent, *&c.*

As for the caſe in 12 *E.* 2. the caſe is, That *J. de. M.* made a Charter to *J. de Burford* of Fee ſimple, and the ſame day it was covenanted between them, That *J. de B.* ſhould hold the ſame Tenements for 8 years, and if he did not pay 100 Marks at the end of the term, that the Land ſhall remain to *J. de B.* and his heirs. In which caſe ſay they, there is a repugnancy, *&c.* for the Covenant being made after the Charter, could neither alter the abſolute Charter, nor upon a Condition precedent give him a Fee ſimple that had a Fee before.

To all the other Books, *viz.* 7 *E.* 3. *&c.* they ſay, that being rightly underſtood, they are good Law, for in ſome of thoſe Books, as in 10 *E.* 3. 10 *Aſſ. &c.* it appeareth, That there was a Charter made in ſurety of the Term, which ſay they muſt be intended thus, *viz.* A man maketh a leaſe for years, the leſſee enters, and the leſſor makes a Charter to the leſſee

leſſee, and thereby doth grant unto him, that if he pay unto the leſſor 100 Mark during the term, That then he ſhall have fee, *&c.*

In this caſe, ſay they, there need no livery ſeiſin, but doth enure as an Executory grant by encreaſing of the ſtate, and the Fee ſimple paſſeth not before the Condition performed, *Pl.* 487. *Nichol*'s Caſe. And therefore *Littleton* warily putteth his caſe made all at one time by one Conveyance, and a Livery made thereupon.

And this diverſity (ſay they) is proved by Books, 10 *E.* 3. 54. 32 *E.* 3. *Garr.* 30. 43 *E.* 3. 35. 20 *Aſſ. Pl.* 20.

And they add, that *Littleton* had ſeen and Conſidered of the ſaid Books, and hath ſet down his Opinion, *&c. Fol.* 118. a.

Benigne lector utere tuo judicio, nihil enim impedio. Conditio beneficialis que ſtatum conſtruit benigne ſecundum verbor' intentionem eſt interpretanda, odioſa autem quæ ſtatum deſtruit ſtrictè ſecundum verborum proprietatem eſt accipienda, Lib. 8. fol. 90. *Frances* Caſe.

Note, a precedent Condition to increaſe an eſtate muſt be performed, and if it become impoſſible, no eſtate ſhall riſe.

Regularly when any man will take advantage of a Condition, if he may enter, he muſt enter, and when he cannot enter, he muſt make a claim, becauſe a Freehold and Inheritance ſhall not ceaſe without entry or claim, and alſo the Feoffor or Grantor may wave the condition, *Pl.* 133. *b. Browning.*

If a man bargain and ſell land by Deed indented and inrolled, with a proviſo, That if the Bargainor pay, *&c.* that then the ſtate ſhall ceaſe and be void, he payeth the money, the ſtate is not reveſted in the Bargainor before a re-entry. And ſo it is if a bargain and ſale be made of a reverſion, remainder, advowſon, rent common, *&c. l.* 2. *f.* 50. Sir *Hugh Cholmley*'s Caſe, *fo.* 218. *vide & nota.*

But the ſaid Rule hath divers Exceptions:

1. In this preſent caſe of *Littleton*, for that he can make

no entry, he ſhall not be driven to make any claim to the reverſion, for ſeeing by conſtruction the Freehold and Inheritance paſſeth maintenant out of the leſſor: by the like conſtruction the Freehold and Inheritance by the default of the leſſee ſhall be reveſted in the leſſor without entry or claim, *l. 1. f.* 174. *Dig's* Caſe, 20 *E.* 4. 19. 20 *H.* 7. 4. *b.*

2. If I grant a rent charge in fee out of my Land upon condition; if the condition be broken, the rent ſhall be extinct, *&c.*

3. If a man make a Feoffment unto me in fee upon condition that I ſhall pay unto him 20 *l.* at ſuch a day, *&c.* before the day I let unto him the land for years, reſerving a rent, and after fail of payment, the feoffee ſhall retain the land, *&c.* and the rent is extinct, *&c.* for that the feoffor could not enter, *&c.* for he himſelf was in poſſeſſion, and the condition being collateral, is not ſuſpended by the leaſe: otherwiſe it is of rent reſerved.

If a man make a leaſe for 40 years, and the leſſor grant the reverſion to the leſſee upon condition, and after the condition is broken, the term was abſolutely ſurrendred. And the diverſity is when the leſſor grants the reverſion to the leſſee upon condition, and when the leſſee grants or ſurrenders his eſtate to the leſſor, for a condition annexed to a ſurrender, may reveſt the particular eſtate, becauſe the ſurrender is conditional. But when the leſſor grants the reverſion to the leſſee upon condition, there the condition is annexed to the reverſion, and the ſurrender abſolute, 7 *E.* 4. 29. 14. *E.* 4. 6. 45 *E.* 3. 8 *E.* 2. *Aſſ.* 395. A Guardian in Chivalry took a Feoffment of the Infant, *&c.* 50 *E.* 3. 27. *Vide lib. fo.* 218. b.

Ou le feoffor poit loialment enter pur le condition enfreint, &c. la il nad franktenement devant ſon entry, &c. S. 351.

Sect. 352.

It is neceſſary when a day is limited, to add to the condition that the Feoffee or his heirs do perform the condition; but when no time is limited, then the Feoffee at his peril muſt perform the condition during his life (although there

there be no requeſt made) or elſe the Feoffor or his heirs may re-enter. And when the Feoffee is to give the land to the Feoffor and his wife in Tail before *Michaelmas*, *&c.* and if the Feoffee die before the day, the ſtate of the heir of the Feoffee ſhall be abſolute, 15 *H.* 7. 13. 33 *H.* 6. 26, 27. 9 *El. Dy.* 262. *Pl.* 456. *lib.* 2. *f.* 79. Seignior *Cromwel's* Caſe.

If a man make a Feoffment in fee upon condition that the feoffee ſhall make a gift in Tail to the Feoffor, the remainder to a ſtranger in fee, there the Feoffee hath time during his life, becauſe the Feoffor who is party and privy to the condition, is to make the firſt eſtate. But if the condition were to make a gift in Tail to a ſtranger, the remainder to the Feoffor in fee, there the Feoffee ought to do it in convenient time, for that the ſtranger is not privy to the condition, and he ought to have the profits preſently.

A condition that is to create an eſtate, is to be performed, by conſtruction of Law, as near the condition as may be, and according to the intent of the condition, albeit the letter, *&c.* cannot be performed. But otherwiſe it is of a condition that deſtroyeth an eſtate, for that is to be taken ſtrictly, unleſs it be in certain ſpecial Caſes, *&c.* As if a man mortgage his land to *W.* upon condition, that if the Mortgagor and *J. S.* pay 20 *s.* at ſuch a day to the Mortgagee, that then he ſhall re-enter, the Mortgagor dieth before the day *J. S.* pay the money to the Mortgagee, this is a good performance of the condition. But if a man make a leaſe to two for years, with a proviſo, if the leſſees die during the term, the leſſor ſhall re-enter, one leſſee alien his part and die, the leſſor cannot re-enter, but the Aſſignee ſhall enjoy the term ſo long as the ſurvivor liveth, becauſe the leaſe by the proviſo is not to ceaſe till both be dead, 30 *H.* 8. *Condition. Br.* 190. 33 *H.* 8. *Jointenants. Br.* 62.

Note a diverſity, when the Feoffee dieth, for then the condition is broken; and when the feoffor dieth, for then the eſtate is to be made as near the intent of the condition as may be, 2 *H.* 4. 5. *fo.* 219. *b.*

Note, that after the deceaſe of the husband the ſtate is

not to be made to the wife, and the heirs of her body by her late husband ingendred, and ſo to have an eſtate of Inheritance, as ſhe ſhould have had by ſurvivor, if the eſtate had been made according to the condition, but onely an Eſtate for life without impeachment of Waſte, *&c.*

Sans impeachment per action de Waſte, extends but to the action, *&c. Lib.* 11. *fo.* 83. *l.* 9. *f.* 9. *l.* 2. 23.

Sect. 353, 354.

Note, That the Feoffee hath time during his life to make the eſtate, unleſs he be reaſonably required by them that are to take the eſtate. This is to be intended of parties or privies, and not of meer ſtrangers, for there the ſtate muſt be made in convenient time, *fo.* 220. a.

Si feoffment ſoit fait ſur condition que le feoffee re-enfeoffor pluſors homes, a av. & tener a eux, & a lour heires, &c. & touts ceux que devient av. eſtate mor' devant aſc' eſtate fait a eux, donque doit le feoffee faire eſtate al heire celuy que ſurveſquiſt de eux, a aver & tener a luy, & les heire celuy que ſurveſtquiſt, 220. *b.*

The reaſon wherefore the *Habendum* is thus limited, *&c.* is, for that if it were made to the heirs of the heir, then ſome by poſſibility ſhould be inheritable to the land, which ſhould not have inherited if the Eſtate had been made to the ſurvivor and his heirs, and conſequently the condition broken.

Sect. 355, 356.

Of Diſabilities, ſome be by act of the party, and ſome by act in Law, and ſome by act *in præſenti*, and ſome *in futuro*.

The F offee is diſabled when he cannot convey the Land over acc rding to the condition in the ſame plight, quality and freedom, as the Land was conveyed to him, 13 *H.* 7. 23. *b.* 32 *E.* 2. *Barre* 264. 21 *Aſſ.* 28. 38 *Aſſ. pl.* 7.

Sect.

Sect. 357.

Sile feoffee ſur condition d' enfeoffer un auter &c. fait leaſe pur ans a commencer al jour a vener; this is a preſent diſability and cauſe of entry, for that the Land is not in that freedom, *&c.* as it was conveyed to the Feoffee, and after the State made over according to the Condition the Land ſhall be charged therewith. *l.* 2. *fo.* 59, 60. *Julius Winnington*'s caſe.

Plight ſignifieth not onely the eſtate, but the habit and quality of the Land, and extendeth to rent charges, and to a poſſibility of Dower. *Vide S.* 289. *fo.* 221. *b.*

If the feoffee were married at the time of the feoffment, then the Dower can be no diſability, becauſe the Land ſhall remain, *&c.* as it was at the time of the Feoffment made unto him.

The feoffee being diſabled at any time, though the ſame continue not, yet the Feoffor may re-enter.

And note a diverſity between a diſability for a time on the part of the Feoffee; and on the part of the Feoffor. For if a man make a feoffment in fee upon condition, that the Feoffee before ſuch a day ſhall re-enfeoff the Feoffor, the Feoffee taketh wife, and the wife dieth before the day, yet may the Feoffor re-enter for that, maintenant by the diſability of the Feoffee the condition is broken, But ſo it is not by the diſability of the Feoffor, or his heirs, for if they perform the condition within the time it is ſufficient. 21 *E.* 4. 55. *Trin.* 18 *El. in C. Ban.* Sir *Th. Wiat* s caſe.

Sect. 358.

If the Feoffee be diſſeiſed, and after bind himſelf in Statute Staple, *&c.* or take a wife, this is no diſability in him, for that during the diſſeiſin, the Land is not charged therewith, *&c. f.* 222. *a.* Note, there are other diſabilities implied 18 *Aſſ. pl. ultimo.* 19 *E.* 3. 39. *Lib.* 2. *f.* 80. *b.* Sir *Cromwel*'s caſe.

If a man grant an advowſon upon condition that the grantee ſhall regrant the ſame to the grantor in tail. In this caſe if the Church become void before any regrant, or before

any requeſt made by the grantor, he may take advantage of the Condition, becauſe the Advowſon is not in the ſame plight, *&c. P.* 14. *El. in Com. ban.*

If the Feoffee ſuffer a recovery by default upon a fained title, before execution ſued the Feoffer may re-enter for this diſability. 44 *E.* 3. 9.

Sect. 359, 360.

If an agreement be made between two, that the one ſhall infeoff the other upon condition in ſurety of the paiment of certain money, and after the livery is made to him, and his heirs generally, the State is holden by ſome to be upon condition, in as much as the intent of the parties was not changed at any time, but continued at the time of the livery. 34 *Aſſ. pl.* 1. 13 *E.* 3. *Eſtopp.* 177.

Un Feoffment ſur condition que le Feoffee ne alienam a nulluy, ceſt condition eſt void. So it is of a deviſe, grant, releaſe, confirmation, *&c.* whereby a fee ſimple doth paſs. 33 *Aſſ.* 11. *Doct. & St.* 39. 124. 13 *H.*7. 23. 21 *H.*6. 34. *a.* 8 *H.*7. 10. *b. Arg. ex abſurdo. Vide S.* 722. *f.* 213. *a. Vide, &c.*

Iniquum eſt ingenuis hominibus non eſſe liberam rerum ſuarum alienationem; & rerum ſuarum quilibet eſt moderator, & Arbiter. & Reg. Non valet pactum de re mea non alienanda. But theſe are to be underſtood of conditions annexed to the grant or ſale it ſelf, in reſpect of the repugnancy, and not to any other collateral thing.

Some have ſaid that a man may grant a rent charge newly created out of Lands to a man and his heirs upon condition, that he ſhall not alien that, that is good, bebauſe the rent is of his own creation, but it is againſt the reaſon of *Littleton, &c.*

Before the Statute of *Quia empt. ter.* the Lord might have reſtrained the alienation of his Tenant by condition, becauſe the Lord had a poſſibility of Reverter; and ſo it is in the King's caſe at this day, becauſe he may reſerve a tenure to himſelf. 14 *H.* 4. 13 *H.* 7. 23. 21 *H.* 7. 8. *l.* 5. 56. *Knight's* caſe.

If *A.* be ſeiſed of bl. acre in fee, and *B.* infeoff him of wh. acre

acre upon condition, that *A.* ſhall not alien *B.* acre, the condition is good; for it is annexed to other land, and ouſter not the Feoffee of his power to alien the land whereof the Feoffment was made, and ſo no repugnancy *&c.* And ſo it is of gifts, or ſales of Chattels reals, or perſonals.

Sect. 361.

If a Feoffment in fee be made upon condition, that the Feoffee ſhall not infeoff *F. S.* or any of his heirs or iſſues, *&c.* this is good, *Pl. Com.* 77. *a.* 8 *H.*7. 10. *b.* 21 E.4. 47. *a.*

If the feoffee in this caſe infeoff *J. N.* of intent that he ſhall infeoff *J. S.* this is a breach of the condition; for, *quando aliquid prohibetur fieri ex directo, prohibetur & per obliquum.* *f.* 223. *b.* 10 *H.*7. 11. *D. & St.* 124. 13 *H.*7. 23. In ancient Deeds, *&c.* there was commonly a clauſe, *Quòd licitum ſit donatorio rem datam dare vel vendere cui voluerit, except. viris Religioſis & Judæis,* Bract. *l.* 1. *fo.* 13. *a.*

Sect. 362.

A double Neg. in legal conſtruction, ſhall not hinder the Neg. 33 *Aſſ.* 11. 21 *H.* 7. 11. *Vide S.* 220.

If a man make a leaſe for years, or for life upon condition that they ſhall not grant over their eſtate, or let the land to others, this is good, and yet the grant or leaſe ſhould be lawfull. 21 *H.* 6. 33. 31 *H.* 8. *Dy.* 45. 27 *H.* 8. 17, 19.

Quilibet poteſt renunciare juri pro ſe introducto. Dy. 33 *H.*8. *f.* 48, 49. *lib.* 6. 40, 41. Sir *Ant. Mildmay*'s Caſe.

Note, that to eſtate tail, *&c.* there be divers incidents. 1. To be diſpuniſhed of Waſte. 2. That the wife of the donee in tail ſhall be endowed. 3. The husband, *&c.* ſhall be Tenant by the Curteſie. 4. That, Tenant in tail may ſuffer a common recovery: and therefore if a man make a gift in tail upon condition to reſtrain him of any of theſe incidents, the condition is repugnant and void in Law. 22 *E.* 3. 19. 17 *El.* 343. *Dy.* And note, that a collateral warranty or a lineal with Aſſets in reſpect of the recompence, is not reſtrained by the Statute of *Donis Cond.* no more is the Com-

mon recovery in reſpect of the intended recompence. 13 *H.* 7. 24. *b.*

If a man make a feoffment to a Baron and feme in fee, upon condition that they ſhall not alien, to ſome intent this is good, and to ſome intent it is void: for to reſtrain an alienation by Feoffment, or alienation by Deed, it is good, becauſe ſuch an alienation is tortious and voidable: but to reſtrain their alienation by fine is repugnant and void, becauſe it is lawfull and unavoidable: Whatſoever is prohibited by the intent of any act of Parliament, may be prohibited by condition.

Sect. 363.

A man makes a gift in tail to *A.* the remainder to him, and to his heirs upon condition that he ſhall not alien: ſome are of opinion, that this is a good condition, and ſhall defeat the alienation for the eſtate tail onely, and leave the Fee ſimple in the alienee; for that, the condition in Law extends onely to the eſtate tail. 11 *H.* 7. 6. *&c. fo.* 224. *a.*

But a gift in tail may be made upon condition that tenant in tail, *&c.* may alien for the profit of his Iſſues.

Sect. 364. * Nota.

Home poit doner terres en tail ſur condition que ſi le tenant en le taile ou ſes heires alienont en fee, ou en tail ou pur terme daut. vie. &c. & auxy que ſi touts iſſues veignants del Tenant in taile ſoient morts ſans iſſue; que donques bien lirroit al donor & a ſes heires d' enter, &c. & partiel voy le droit del taile poit erē ſolve apres diſcontent in al iſſue en le taile, ſi aſs y ſoit, iſſint que per voy dentre del donor, ou de ſes heires, le taile ne ſerra my defeat per tiel condition. *Littleton* to make the condition good, addeth an alienation which amounted to a wrong, and he reſtraineth not the alienation onely, but added, and die without iſſue, to the end that the right of the eſtate in tail might be preſerved, and not defeated by the condition, but might be recovered again by the iſſue in tail in a *Formedon.* *Si plures conditiones aſcri-*

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præ fuerunt donationi conjunctim omnibus è parendum, & ad veritatem copulative requiritur quod utraque pars ſit vera. Bract. *l.* 2. *fo.* 19. *Pl.* 76. *Wimbeſh's* caſe, and 107. *Fulmerſton's* caſe. But, *ſi diviſim, cuilibet, vel alteri eorum ſatis è obtemperare & in disjunct. ſufficit alteram partem eſſe veram.*

If a man make a leaſe to the husband and wife for 21 years, if the husband and wife, or any child between them ſo long ſhall live, and then the wife die without iſſue, the Leaſe ſhall continue, for the disjunctive referreth to the whole. *Pl.* 30 *El. Com. ban. Baldwin* and *Cock, Trupennies* caſe; and ſo it is if any uſe be limited to certain perſons, untill *A.* ſhall come from beyond Sea, and attain unto his full age, or die; if he doth beyond Sea come from, or attain to his full age, the uſe doth ceaſe. *H.* 35 *El. Trans per ſur. Mordant. ban. R.*

Sect. 365.

Il è common erudit. q e home per plee ne defeatera aſc' eſtate de franck-tenement per force daſc' tiel condition. Sin que il merrer le propoſe de condition en eſcript, &c. Si non en ſpecial caſes, &c. Mes de chattels reals, ſicome de leaſe pur ans, auterment eſt; & iſſint è de dones & grants, de chattels perſonals, and *contracts perſonals, &c.*

Be the action real, perſonal, or mixt, if a Condition be to defeat a freehold, it is Reg. true, that a Deed muſt be ſhewed forth in Court. Becauſe every Deed ought to approve it ſelf, that it be ſufficient in Law, and that the Court ſhall adjudge: and ſecondly be proved by others, and this concerns matters of Fact, as ſealing and delivery, and belongs to the Jurors. 25, 26. 14 *H.* 8. 22. *b.* 28 *Aſſ. pl.* 1. *l.* 10. *fo.* 92. Dr. *Layfield's* caſe. 11 *H.* 7. 22. *b.*

Upon a gift in tail, or a leaſe for life a rent may be reſerved without deed, but a condition with re-entry cannot be reſerved without deed in this caſe. 45 *E.* 3. 21. *a.*

By the Statute of 3 and 4 *E.* 6. *ca.* 4. and 13 *El. ca.* 6. the exemplification or *conſtat* under the great Seal of the inrolment of any Letters Patents made ſince the 4 of *Feb.* 27 *H.* 8. or after to be made, ſhall be ſufficient to be pleaded and

ſhewed forth in Court as well againſt the King, as any other perſon by the Patentees themſelves, *&c. Dy.* 1 *El.* 167. 12 *H.*7. 12. *b.*

A *conſtat Inſpeximus, &c.* ought to be had onely of the inrolment of Record, and no deed, *&c.* can be inrolled, unleſs it be duly and lawfully acknowledged. *Lib.* 8. *fo.* 8. The Princes caſe. *l.* 5. *fo.* 52, 53. *Page*'s caſe.

If Guardian in Chivalry in right of the heir enter for a condition broken, he ſhall plead the ſtate upon Condition without ſhewing of any deed, becauſe his intereſt is created by the Law; and ſo it is of a Tenant by Stat. Merch. *&c.* and of Tenant in Dower, *&c.* 20 *H.*7. 5. 35 *H.*6. *Manors des faits* 11. *b.*

But the Lord by Eſcheat albeit his eſtate be created by law ſhall not plead condition to defeat a freehold without ſhewing of it, becauſe the deed doth belong unto him. A Tenant by the Curteſie ſhall not plead a Condition made by his wife, *&c.* without ſhewing the deed.

But Leſſees for years, and all others that claim by any conveiance from the party, or juſtify as ſervant by commandment, *&c.* muſt ſhew the deed, 14 *H.* 8. 8. *Pl.* 149.

R. brought an ejection firme againſt *E.* of the Manor of *D.* which he had for years of the demiſe of *C. &c. E.* maintained his entry, *&c.* and ſhewed no deed, and the plea was good, becauſe the thing was executed, *Vide le caſe fo.* 226. *a.* 44 *E.* 3. 22. Nota the Defendant being iſſue in tail was remitted to the eſtate tail.

If land be morgaged upon condition, and the morgagee letteth the lands for years, reſerving a rent, the Condition is performed, the morgagor re-enters, in an act of debt brought for the rent, the leſſee ſhall plead the condition, and re-entry without ſhewing forth the deed. 45 *E.* 3. 68. *Finch.* 10 *H.* 4. 9. *b.*

If a woman give Land to a man and his heirs by deed, or without generally, ſhe may in pleading averr the ſame to be *cauſa matrim. prolocuti*, albeit ſhe hath nothing in writing to prove the ſame. 9 *E.*4. 25, 26. 14 *H.*8. 22. *b.* 11 *H.*7. 22. *b.* *F. N. B.* 205. *b.*

Sett.

Sect. 366.

Item Comt. que home ne poit en aſc' alt' pleaded un condition que concerne le franktenement, ſans manurer eſcript de ceo; encore poit home eſtre aid ſur tiel condition per verdict de 12. *homes priſe alarge en Aſſ. de no. diſſ. &c. Vide S. &c.*

Judicium, eſt quaſi juris dictum. l. 8. *fo.* 155. *l.* 9. *f.* 13. *l.* 11. *f.* 10. *Ex facto jus oritur fo.* 206. *Vide, &c.*

Omnis concluſio boni & veri judicii ſequitur ex bonis & veris promiſſ. & dictis Jurator. Trin. 33 *E.* 1. *In Theſaur. utile per inutile non vitiatur. M.* 28 *El. &* 29. *Gomerſhall account in Ban. R.* 32 *E.* 3. *Ceſſavit* 25. 5. 484, 485.

If the matter and ſubſtance of the iſſue be found, it is ſufficient. *S.* 58. 35 *Aſſ.* 8. 1 *H.* 4. 6. *b.* 27 *H.* 8. 22. *b. P.* 515. *l.* 4. *f.* 53. *Raulin's* caſe, and *Pledol's* caſe. *H.* 31. *El. Sutton, &c. Com. ban.*

Eſtopper which bind the intereſt of the Land, as the taking of a leaſe of a man's own land by deed indenture, *&c.* being ſpecially found by the Jury, the Court ought to judge according to the ſpecial matter; for albeit eſtopper Reg. muſt be pleaded and relied upon by an apt concluſion, and the Jury is ſworn *ad verit. dicendam*, yet when they find *veritatem facti*, they purſue well their oath, and the Court ought to judge according to Law. So may the Jury find a warranty being given in evidence, though it be not pleaded, becauſe it bindeth the right, unleſs it be in a Writ of right, when the Meſc. is joyned upon the Meer right, 34 *E.* 3. *Droit* 29.

After the verdict recorded, the Jury cannot vary from it, *Pl. Freeman's* caſe. 11 *H.* 4. 2. 20 *Aſſ.* 12. 5 *H.* 7. 22.

An iſſue found by verdict ſhall always be intended true untill it be reverſed by attaint, and thereupon, *&c.* no *Superſedeas* is grantable by Law.

If the Jury after evidence at Bar, *&c.* do at their own charges eat or drink either before or after they be agreed on their verdict, it is finable, but it ſhall not avoid the verdict. *P.* 24 *H.* 8. *Juſt. Spilman Ban. R.* 29 *H.* 8. 37. *Dyer P.* 6 *E.* 6. *Com. Ban.* 11 *H.* 4. 16, 17. 24 *E.* 3. 75.

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The King cannot be Nonſuit, for he is ever preſent in Court in judgment of Law. 21. *E.*3. 18.

The Condition is executed by re-entry, and yet the Leſſor after his re-entry, ſhall not plead the condition without ſhewing the deed, becauſe he was party and privy to the condition, for the parties muſt ſhew forth the Deed, unleſs it be by the act and wrong of the party; but an eſtranger which is not privy to the condition, nor claimeth under the ſame, ſhall not after the condition is executed in pleading, be forced to ſhew forth the Deed. *Pl.* 92. 9 *H.*7. 3. *Lib.* 9. 12, 13. *Downam's* Caſe. 31 *Aſſ. pl.* 21. 10 *H.* 4. 9.

Note, that a ſpecial verdict or at large, may be given in any action, and upon any iſſue, be the iſſue general or ſpecial 8 *E.* 4. 29. 11 *El. Dyer* 283, 284.

*Diſcretio ē diſcernere per legem quid ſit juſtum. Si à jure diſcedas, vagus eris, & erunt omnia omnibus incerta. l.*10. *fo.*4. caſe *de Sewers.*

Sect. 367.

A verdict is twofold. 1. A verdict at large, or a ſpecial verdict, becauſe it findeth the ſpecial matter, *&c.* Or leaves it to the judgment of the Court. 2. A general verdict, that is generally found according to the iſſue, as if the iſſue be not guilty, to find the party guilty, or not guilty generally, *&c.* There is alſo a verdict given in open Court, and a privy verdict given out of Court before any of the Judges of the Court.

To find the ſpecial matter is the ſafeſt way for the Jury where the caſe is doubtfull.

Sect. 369.

Leaſe pur vie rendt. rent & re-entry ſur condition, &c. & ceo eſt ſans fait; leſſor enter pur non payment, &c. leſſee enter ſur le leſſor et luy diſſeiſt, &c. en cē caſe le diſſeiſee navera Aſſ. et enc' ſi le leſſee ſoit pl'. et le leſſor defendant, il bar. ſe leſſee par verdict de Aſſ. &c. Mes en ceo caſe lou leſſee eſt defendant ſil ne voile plead le leaſe pur vie, &c. en bar. mes plede nulltort nul diſſ. donques le leſſor recovera

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per Aſſize, 4 *El. Dyer* 207. 8 *El. Dyer* 246. A leaſe for life, The reverſion to the Plaintiff was a good bar in Aſſize, and alſo that a leaſe for years, the reverſion to the Plaintiff might be pleaded in an Aſſize; and ſo of a Feoffment with Warranty.

And note a diverſity, *viz.* of a leaſe for life, the Tenant ſhall plead it in bar. But in caſe of a leaſe for years, or of an eſtate of Tenant by Statute or Elegit, the Defendant ſhall not plead in bar, as to ſay, *Aſſ. non, &c.* but juſtifie by force of the leaſe, *&c.* and conclude, *& iſſint ſans tort.* And if the Tenant of the Freehold be not named, he ſhall plead *Nul tenant de franktenement noſme en le breve*; and in the caſe of the Feoffment with Warranty, he muſt relie upon the Warranty, 18 *E.* 4. 10. 12 *Aſſ.* 38.

ſi.

Sect. 370.

Si indenture ſoit bipartite, ou tripartite, &c.. touts les parts del endent' ne ſon que un fait en ley, & cheſc' part del endent' eſt auxi de grand force & effect, ſicome touts les parts enſemble, l. 5. fol. 20. *Stile*'s Caſe. An Indenture may be without words, but not by words without indenting. A Deed poll, becauſe it is cut even, polled, *&c.*

Note, That if the Feoffor, Donor or Leſſor, ſeal the part of the Indenture belonging to the Feoffee, *&c.* the Indenture is good, albeit the Feoffee never ſealed the Counterpart belonging to the Feoffor, *fo.* 229. *a.* 9 *E.* 4. 18. *Pl.* 134.

Sect. 371, 372.

A communia obſervantia non eſt recedendum, & minimè mutanda ſunt quæ cert' habuernnt interpretationem; *Magiſter rerum uſus*, 17 El. Dyer 342. 12 H. 4. 12. 30 Aſſ. 31.

It is provided by the Statute of 38 *E.* 3. cap. 4. That all penal bonds in the third perſon be void; wherein ſome of our books ſeem to differ, *&c.* But the Statute was principally intended of the Courts of *Rome*; in which Courts bonds were taken in the third perſon: So as ſuch bonds made out of the Realm are void, but other bonds in the third perſon

ſon are reſolved to be good as well as Indentures in the third perſon, 40 *E.* 3. 1. 2 *H.* 4. 10. 8 *E.* 4. 5.

Brevis via per exempla, longa per præcepta. It is a ſafe thing to follow approved Preſidents; for, *Nihil ſimul inventum eſt, & perfectum.*

Sect. 373. *Fol.* 230. *b.*

Si en l' endenture fait en le 3. perſon, ou en le 1. perſon mention ſoit fait que le grantor avoit miſe ſolement ſon ſeale & nemy le grantee, donques eſt l' endent' tantſolement le fait le grantor. Mes lou mention eſt fait que le grantee ad miſe ſon ſeale, &c. donques il eſt le fait d' ambideux, &c.

The Feoffee is no way made party to make it, being made in the firſt perſon, but onely by the clauſe of putting his Seal thereunto. *Vide Lib. &c.*

Sect. 374.

If *A.* by deed indented between him and *B.* let Lands to *B.* for life, the remainder to *C.* in fee, reſerving a rent; Tenant for life dieth, he in remainder entreth into the Lands, he ſhall be bound to pay the rent, becauſe he agreeth to have the Lands by force of the Indenture, 50 *E.* 22. 3 *H.* 6. 26. *b. fo.* 231. *a.*

An indenture of Leaſe is ingroſſed between *A.* of the one part, and *D.* and R. of the other part, which purport a demiſe for years by *A.* to *D.* and *R. A.* ſealeth and delivereth the Indenture to *D.* and *D.* ſeal the Counterpane to *A.* but *R.* did not ſeal and deliver it. And by the ſame Indenture it is mentioned, That *D.* and *R.* did grant to be bound to the Plaintiff in 20 *l.* in caſe that certain Conditions compriſed in the Indenture were not performed. And for this 20 *l. A.* brought an action againſt *D.* onely, and ſued forth the Indenture.

The Defendant pleaded, That it is proved by the Indenture, that the demiſe by Indenture was made to D. and *R.* which *R.* is in full life, and not named in the Writ, Judgment of the Writ. The Plaintiff replied, that *R.* did ne-

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ver ſeal and deliver the Indenture, and ſo his Writ was good againſt *D.* ſole. And there the Counſel of the Plaintiff took a diverſity between a rent reſerved, which is parcel of the Leaſe, and the Land charged therewith, and a ſum in groſs, as here the 20 *l.* is; for as to the rent, they agreed, That by the agreement of *R.* to the Leaſe, he was bound to pay it, but for the 20 *l.* that is a ſum, in groſs, and collateral to the Leaſe, and not annexed to the Land, groweth due onely by the deed, and therefore *R.* ſaid he was not chargeable therewith, for that he had not ſealed and delivered the Deed. But in as much as he had agreed to the Leaſe which was made by Indenture to the ſame ſum in groſs, and for that *R.* was not named in the Writ, it was adjudged that the Writ did abate, 38 *E.* 3. 8. a. *vide* 44 *E.* 3. 11, 12.

Qui ſentit commodum, ſentire debet & onus: & tranſit terra cum onere.

Sect. 375.

Le Feoffor poit pledere condition en fait Poll; pur ceo que il eſt privy al fait, &c.

Felix qui potuit rerum cognoſcere cauſas.

Et ratio melior ſemper prævalet. Fo. 231. b.

If the Deed remain in one Court, it may be pleaded in another Court without ſhewing forth: *Quia lex non cogit ad impoſſibilia.* 40 Aſſ. 34. l. 5. 75. b. *Wymark's* 12 H. 4. 8. *F. N. B.* 243.

Sect. 376.

When divers do a Treſpaſs, the ſame is joint or ſeveral, at the will of him to whom the wrong is done; yet if he releaſe to one of them, all are diſcharged, becauſe his own Deed ſhall be taken moſt ſtrong againſt himſelf; but otherwiſe it is in caſe of Appeal of Death, *&c.* As if two women be jointly and ſeverally bound in an Obligation, if the Obligee releaſe to one of them, both are diſcharged; and ſeeing the Treſpaſſers are parties and privies in wrong, the one ſhall not plead a Releaſe to the other, without ſhewing,

of

of it forth, albeit the Deed appertain to the other, 27 *E.* 3. 83. 13 *E.* 4. 2. 15 *E.* 4. 26. 21 *E* 4. 72. 22 *E.* 4. 7. 13 *H.* 8. 10. 34 *H.* 8. *eſtrange al fait* 21.

Sect. 377.

Semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c. Ratio, eſt radius divini luminis.

If a man hath an Obligation, though he cannot grant the thing in action, yet he may give or grant the Deed, *viz.* the Parchment and Wax to another, who may cancel, and uſe the ſame at his pleaſure.

Omnia præſumuntur legitimè facta, donec probetur in contrarium. Injuria non præſumitur, fo. 232. *b.*

There be three kinds of unhappy men:

1. *Qui ſcit, & non docet. Infelix cujus nulli ſapientia prodeſt.*

2. *Qui docet, & non vivit. Infelix qui recta docet cum vivit inique.*

3. *Qui neſcit, & non interrogat.*

Infelix qui pauca ſapit ſpernitq; doceri.
Inter cuncta leges, & percuncta abere doctos.

Sect. 378.

Eſtates que homes ont ſur condition en ley, ſont tiels eſtates que ont un condition per la ley a eux annex, comment que ne ſont ſpecifie en eſcript: ſicome home grant perſon fait a un auter le office del Parkerſhip pur terme de ſon vie, le eſtate que il ad en le office ſur condition en ley ſc' que le Parker bien & loialment gardian le Park, &c. (iſſint eſt de offic' de Seneſchalſhip, &c.) auterment bien lirroit al grantor & a ſes heires de luy ouſte, &c. Quia in eo quo quis delinquit, in eo de jure eſt puniendus, 15 *E.* 4. 3. l. 5 *E.* 4. 26. 28 *H.* 8. *Bendloes, &c. Lib.* 6. *fo.* 50. 95, 96, 99. *Mich.* 33 *E.* 1. *Coram Rege in Theſaur' leveſq; de* Durham's *Caſe.*

Forreſta eſt tuta ferar' manſio non quarumlibet, ſed ſilveſtrium, non quibuſlibet in locis, ſed certis & ad hoc idoneis, unde

nde foreſta E. mutata in O. quaſi fereſta, hoc eſt, ferarum ſtatio. Ockam. vide Bract. fo. 231, *&* 316.

Non-uſer of it ſelf without ſome ſpecial damage, is no forfeiture of private Offices; but Non-uſer of publick Officers which concern the adminiſtration of Juſtice, or the Commonwealth, is of it ſelf a cauſe of forfeiture, *Pl.* 379, 380. 2 *H.* 7. 11. 30 *H.* 6. 32, *&c.*

There is a diverſity between Officers that have no other profit, but a collateral certain fee, for there the grantor may diſcharge him of his ſervice; as to be a Baily, Receiver, Surveyor, Auditor, *&c.* the exerciſe whereof is but labour and charge to him, but he muſt have his Fee: for the main Rule of Law is, That no man can fruſtrate or derogate from his own grant to the prejudice of the grantee, 18 *E.*4.8. 31 *H.*8. *Grants Br.* 134. 34 *H.* 8. *ibid.* 93. 11 *El. Dyer* 285.

But in all caſes where the Officer relinquiſheth his Office, and refuſeth to attend, he loſeth his Office, Fee, Profit, and all.

There is another diverſity, where the grantee, beſides his certain fee, hath profits and vails by reaſon of his Office, as the Office of a Stewardſhip of Courts, there the grantor cannot diſcarge him of his ſervice or attendants, for that ſhould be to the prejudice of the grantee, 22 *H.*6. 10. 3. 6 *E.* 6. *Dyer* 72.

Conditions in Law be of two natures, *i. e.* by the Commonlaw, and by Statute; and thoſe by the Commonlaw are of two natures, *i. e.* the one is founded upon skill and confidence, as here the Office of Parkerſhip; the other without skill or confidence; whereof ſome by the Commonlaw, and ſome by the Statute. By the Commonlaw, as to every eſtate of Tenant by the Curteſie, Tenant in Tail after poſſibility, *&c.* Tenant in Dower, Tenant for life, for years, Tenant by Statute Merchant, or Staple, by Elegit, Gardian, *&c.* there is a condition in Law ſecretly annexed to their eſtates, that if they alien in fee, *&c.* that he in the reverſion or remainder may enter, *&c.* or if they claim a greater eſtate in Court of Record, *&c. Pl. Com.* 373. a. Sir *H. Nevil's* caſe. 21 *E.*4.20. 93. 8 *f.*44. *Wittingham's* caſe, concerning condition in law founded

ded upon Statutes, for ſome of them an entry is given, and for ſome others a recovery by action: where an entry is given as upon an Alienation in Mortmain, *&c.* and the like where an action is given, as for Waſte againſt Tenant for life and years, *&c.*

As for Example, admit that an Office of Parkerſhip be granted or deſcend to an Infant or feme Covert; if the Condition in Law annexed to this Office which require skill and confidence be not obſerved and fulfilled, the Office is loſt for ever, becauſe it is as ſtrong as an expreſs Condition. But if a Leaſe for life be made to a feme covert, or an Infant, and they by Charter of Feoffment alien in Fee, the breach of this Condition in Law, that is, without skill, *&c.* is no abſolute forfeiture of their Eſtate. So of a condition in Law given by Statute, which giveth an entry onely. As if an Infant or feme Covert with husband, aliens by Charter of Feoffment in Mortmain, this is no Bar to the Infant or feme Covert. But if a recovery be had againſt an Infant or feme Covert in an action of Waſte, there they are bound and barred for ever.

And note, that a condition in Law by force of a Statute, which giveth a recovery, is in ſome caſe ſtronger than a condition in Law without a recovery: for if a Leſſee for life make a leaſe for years, and after enter into the Land and make waſte, and the leſſor recover in an action of waſte, he ſhall avoid the leaſe made before the Waſte done, (becauſe of neceſſity the action of Waſte muſt be brought againſt the leſſee for life, which in that caſe muſt bind the leſſee for years, or elſe by the act of the leſſee for life, the leſſor ſhould be barred to recover *locum vaſtatum*, which the Statute giveth.) but if the leſſee for life make a leaſe for years, and after enter upon him, and make a Feoffment in Fee, this forfeiture ſhall not avoid the leaſe for years.

Reg. A man that taketh advantage of a Condition in Law, ſhall take the Land with ſuch charge as he finds it.

And a condition in Law, is as ſtrong as a condition in Deed as to avoid the Eſtate, or Intereſt it ſelf, but not precedent charges to avoid, but in ſome particular caſes. *Utique fortiùs*

&

& potentior eſt diſpoſitio legis quam hominis. Vide S. 419, 429, 430. *f.* 234. *a.*

For Offices in any wiſe touching the Adminiſtration or execution of Juſtice, or Clerkſhip in any Court of Record, or concerning the King's Treaſure, Revenue, Account, Cuſtomes, Alnage, Auditorſhip, King's Surveyor, or keeping of any of his Majeſties Caſtles, Forts, *&c.* Condition in Law are annexed, *&c.* 3 *H.* 7. c. 12. 7 *E.* 6. c. 1. 5 *E.* 6. c. 16.

And note, that all promiſes, Bonds and Aſſurances (for ſuch Offices, *&c.*) as well on the part of the bargainor, as of the bargainee, are void, *&c. Nulla alia re magis Rom. Reſpub. interiit, quam quod Magiſtratus officia venalia erant.* M. 13 Ja. R. lib. 3. f. 83. *Colſhil's* caſe. *Ærod.* fo. 343.

Jugurtha going from *Rome*, ſaid to the City, *Vale venalis Civitas, mox peritura ſi emtorem invenias.* Saluſt. 12 *R.* 2. cap. 2.

Sect. 379.

The Oath of a Beadle (or Under-bailiff) of a Manor, is, That he ſhall duly and truly execute all ſuch Attachments and other Proceſs as ſhall be directed to him from the Lord or Steward of his Court, and that he ſhall preſent all Pound-breaches, which ſhall happen within his Office, and all Chattels waved, and Eſtrayes.

Sect. 380.

Si leaſe ſoit fait al Bar. & feme, a aver & tenant a eux durant le coverture enter eux, en cē caſe ils ont eſtate pur terme de lour 2. vies, ſur condition en ley, ſc' ſi un de eux devie, ou que devorce ſoit fait enter eux, donques bien lirroit a leſſor & aſes heires dentr. &c.

Durante, dummodo, dum, quamdiu, donec, quouſque, uſque, ad, Tam, Diu, ubicunque, are words of limitation, 37 *H.* 6. 27. 10 *Aſſ.* 4. 11 *Aſſ.* p. 8. 7 *E.* 4. 16. 9 *E.* 4. 25, 26. 14 *H.* 8. 13.

Divorces, *à vinculo Matrimonii* are theſe, *cauſa præcontractûs, cauſa metus impotentiæ ſeu frigiditatis, Affinitatis, conſanguinitatis, &c.* Divorce, *à menſa & Thoro,* diſſolveth not the mar-

marriage *à vinculo Matrimonii*, for it is ſubſequent to the marriage, as *cauſa Adulterii*, 18 *E.* 4. 28. 24 *H.* 8. 8. *Baſtardy.* 11 *H.* 4. 14. 76. *Vide S.* 399. 32 *H.* 8. c. 38.

A man married the daughter of the ſiſter of his firſt wife, and it was declared by Act of Parliament to be good. *Trin. Ja. Rot.* 1032. *Ri. Parſon's* caſe, *fo.* 235. *b.*

Sect. 381.

Logick teacheth a man not onely by juſt argument to conclude the matter in queſtion, but to diſcern between truth and falſhood, aud to uſe a good method in his ſtudy, and probably to ſpeak to any legal queſtion.

Arg. à diviſione. Pl. Com. 561. b. *Vide S.* 345.

Sect. 383.

Note a diverſity, *viz.* when a man diviſeth that his executor ſhall ſell the Land, there the Lands deſcend in the mean time to the heir, and untill the ſale be made, the heir may enter to take the profits. But when the Land is deviſed to his Executors to be ſold, there the deviſe taketh away the deſcent, and veſteth the State of the Land in the Executor, and he may enter and take the profits, and make ſale according to the deviſe, and the mean profits taken before the ſale, ſhall not be Aſſets, ſo as he may be compellable to pay debts with the ſame, and therefore he muſt ſell the Lands as ſoon as he can, for otherwiſe he ſhall take advantage of his own Laches.

A man ſeiſed of certain Lands holden in Socage, had iſſue two daughters *A.* and *B.* and deviſed all his Lands to *A.* and her heirs, to pay unto *B.* a certain ſum of money at a certain day and place, the money was not paid, and it was adjudged that thoſe words, To pay, *&c.* did amount in a Will to a Condition, becauſe the Land was deviſed to *A.* for that purpoſe; otherwiſe *B.* ſhould be remedileſs. *Et intereſt Reipublicæ ſuprema hominum teſtamenta rata haberi:* and the heir of *B.* upon an actual ejectment recovered the moity of the Land againſt *A. M.* 31. and 32 *El. Ban. R. Crickmer's* caſe *Dyer* 6 *E.*

6 E. 6. fo. 74. 7 E. 6. 70. *Judicium pro veritate accipitur*, Fo. 236. b.

Sect. 384.

Defaire, i. e. to defeat or undoe, *infectum reddere quod factum eſt.* There is a diverſity between inheritances executed, and inheritances executory, as lands executed by livery, *&c.* cannot by Indenture of defeaſance be defeated afterwards; and ſo if a diſſeiſee releaſe a diſſeiſor, it cannot be defeated afterwards, *&c.* but at the time of the releaſe, *&c.* the ſame may be defeated, *&c.* for, *Quæ incontinenti fiunt ineſſe videntur*, Bract. l. 2. f. 16. 17 *Aſſ.* p. 2. 30 *Aſſ.* p. 1. 11. But rents, annuities, conditions, warranty, *&c.* that be inheritances executory, may be defeated by defeaſances, made either at that time, or at any time after, and ſo the law is of Statute, Recognizance, Obligation, and other things executory, 20 *Aſſ. p.* 7. 7 *E.* 4. 29. *Brown* and *Beſton*'s caſe, *Pl.* 131. 28 *H.* 8. *Dy.* 6. 27 *H.* 8. 15.

If a man ſeiſed of Lands in fee, and having iſſue divers ſons, by deed indented covenanteth in conſideration of fatherly love, *&c.* to ſtand ſeiſed of three acres of land, to the uſe of himſelf for life, and after to the uſe of *Thomas* his eldeſt Son in Tail; and for default of ſuch iſſue to the uſe of his ſecond Son in Tail, with divers like remainders over; with a Proviſo, that it ſhall be lawfull for the Covenantor at any time during his life, to revoke any of the ſaid uſes, *&c.* This Proviſo being coupled with an uſe, is allowed to be good: but in caſe of a Feoffment, or any other Conveyance, whereby the feoffee or grantee, *&c.* is in by the Commonlaw, ſuch a Proviſo were meerly repugnant and void, 27 *H.* 8. cap 10. And firſt in the caſe aforeſaid if the Covenantor who had an eſtate for life, do revoke the uſes according to his power, he is ſeiſed again in fee ſimple without entry or claim. 2. He may revoke part at one time, and part at another. 3. If he make a Feoffment in fee, or levy a fine, *&c.* of any part, this doth extinguiſh his power but for that part, whereas in that caſe the whole condition is extinct; but if it be made of the whole, all the power is extinguiſhed. So as to ſome purpoſes,

it

it is of the nature of a Condition, and to other purpoſes in nature of a limitation. *Lib.* 1. *f.*173, 174. *Digge's* Caſe. *l.*1. *f.* 107. *Albainer's* Caſe. *l.*10. *f.*143. *Scroop's* Caſe. *Li.*7. *f.*12,13, Sir *Francis Engleſield's* Caſe. 4. If he that hath ſuch a power of revocation hath no preſent intereſt in the Land, nor by the leſſor of the Eſtate ſhall have nothing, then his Feoffment or Fine, *&c.* of the Land is no extinguiſhment of his power, becauſe it is meer collateral to the Land. 5. By the ſame conveyances, that the old uſes be revoked, may new be created and limited where the former ceaſe *ipſo facto* by the revocation, without either entry or claim. 6. That theſe revocations are favourably interpreted, becauſe many mens inheritances depend upon the ſame.

Ex paucis dictis intendere plurima poſſis.

CHAP. VI.

Diſcent que tollent entries.

Sect. 385.

DEſcendere, i. e. ex loco ſuperiore in inferiorem movere. Brit. *fo.* 115, 215. *Vide* S. 5.

The Civilians call him, *hæredem qui ex teſtamento ſuccedit in univerſum jus teſtatoris.* But by the Commonlaw he is onely heir which ſucceedeth by right of bloud. *Hæres dicitur ab hærendo, quia, qui hæres ē, hæret, hoc eſt, proximus eſt ſanguine illi cujus eſt hæres,* So as he that is *hæres, ſanguinis eſt hæres & herus hæreditatis. Nota,* in ancient time if the diſſeiſor had been in long poſſeſſion, the diſſeiſee could not have entred upon him, *Brit. Fo.* 115. Likewiſe the diſſeiſee could not have entred upon the Feoffee of the diſſeiſor if he had continued a year and a day in quiet poſſeſſion. But the law is changed in both theſe caſes, onely the dying ſeiſed being an act in Law doth hold at this day. 1 *Aſſ.*13. 9 *Aſſ.*15. *Lamb. explic. f.*12[illegible]

70. *Porro autem quam maritus ſine lite & controverſia ſedem incoluerit, eam conjux & proles ſine controverſia poſſidento, ſiqua in illum lis fuerit illata viventem, eam hæredes ad ſe (perinde atque is vivus) accipiunto.*

And one of the reaſons of this ancient Law may be, that the heir cannot ſuddenly by intendment of Law, know the true ſtate of his Title. *Vide lib. fo.* 237. *b.*

To a diſcent that taketh away an entry, a dying ſeiſed is neceſſary, but a man to other purpoſes may have lands by diſcent, though his Anceſtor died not ſeiſed. 11 *H.*7.12. 40 *E.*3. 24.

Diſcents of Inheritance incorporeal which lies in grant, as Advowſons, Rents, Commons in groſs, &c. do not put him that right hath to an Action; otherwiſe it is of houſes and lands. 6 *H.*4.4. 15 *E.*4.14. *F.N.B.*143.9. 7 *H.*4.12.5. 2 *Aſſ. p.*9.

A Recovery is had againſt Tenant for life, where the remainder is over in fee, Tenant for life dieth, he in remainder enters before execution and dieth ſeiſed, the entry of the Recoveror is lawful, becauſe he is privy in eſtate, otherwiſe it is if the diſcent had been after execution. 3 *E.*4.6. 12 *E.*4.19. 3 *H.*7.3. 6 *E.*4.11. 7 *H.* 7.15. 5 *H.*7.31. 10 *H.*7.5.*b.* 5 *H.*7.2.

A. recovereth an Advowſon againſt *B.* in a Writ of Right, and hath judgment final, the Incumbent dieth, *B.* by uſurpation preſents to the Church, and his Clerk is admitted and inſtituted, *B.* dieth, *A.* is out of poſſeſſion, and the heir of *B.* is not ſo bound by the judgment either in bloud or eſtate, but that he ſhall preſent, 45 *E.*3. *qu. imp.* 139.*b.* levies a fine to *A.* of an Advowſon to him and his heirs, after the Church becomes void. *B.* preſents by uſurpation, and his Clerk is admitted and inſtituted this ſhall put *A.* the Conuſee out of poſſeſſion. 8 *E.*2. *Qu. Imp.* 166. Albeit the uſurpation were in both the ſaid caſes before execution, yet it puts the rightful Patron out of poſſeſſion. So note a diverſity between a recovery of Land, and of an Advowſon.

Now by the Statute made ſince *Littleton* wrote, it is enacted that except the diſſeiſor hath been in the peaceable poſ-

ſeſſion of ſuch Manors, Lands &c. whereof he ſhall die ſeiſed by the ſpace of five years next after ſuch diſſeiſin, &c. without entry or continual claim, &c. that there ſuch dying ſeiſed, &c. ſhall not take away the entry, &c. 17 *H.6.1. Leſtat.* 32 *H.8. c.*33. *Sect.*422.426. *Pl.*47. *Wimbiſhes* Caſe, *fo.*231. *a. vid. &c.*

Ad ea quæ frequentius accidunt, jura adaptantur.

The Feoffee of a diſſeiſor is out of the ſaid Statute, and remains as at the Common Law. *M.4 & 5 El. Dyer* 219.

But if a man make a leaſe for life, and the leſſee for life is diſſeiſed, and the diſſeiſor diſſeiſed within 5 years, the leſſee for life may enter; but if he die before he doth enter, it is ſaid that the entry of him in the reverſion is not lawful, becauſe his entry was not lawful at the time of the diſcent.

*Sect.*386.

If a diſſeiſor make a gift in Tail, and the donee diſcontinueth in fee, and diſſeiſe the diſcontinuee, and dieth ſeiſed, this diſcent ſhall not take away the entry of the diſſeiſee, for the diſcent of the Feeſimple is vaniſhed and gone by the Remitter, and albeit the iſſue be in by force of the eſtate Tail, yet the donee died not ſeiſed of that eſtate, *Fol.*238. *b.*

If a diſſeiſor make a gift in Tail, and the donee hath iſſue, and dieth ſeiſed, now is the entry of the diſſeiſee taken away; but if the iſſue die without iſſue, the entry of the diſſeiſee is revived, and he may enter upon him in the reverſion and remainder, 9 *H.7.*24.

So if there be Grandfather, Father and Son, and the Son diſſeiſe one, and infeoff the Grandfather, who dieth ſeiſed, &c. the entry is taken away; but if the Father dieth ſeiſed, and the land deſcend to the Son, now is the entry of the diſſeiſee revived, and he may enter upon the Son, who ſhall take no advantage of the diſcent, becauſe he did wrong unto the diſſeiſee. 13 *H.4.* 8,9. 33 *H.6.5. b. per Moyl.* 34 *H.6.*11. *a. per Cur. S.* 393, 395. 13 *E.3. B. Ent. cong.*127. *vide & qu.*

If a diſſeiſor make a Leaſe to an Infant for life, and he is diſſeiſed, and a diſcent caſt, the Infant enters, the entry

try of the diſſeiſee is lawful upon him.

Of Writs of Entry *ſur* diſſeiſin there be four kinds:

The 1. is a Writ of Entry in the nature of an Aſſize, 19 *H.* 6.56. 9 *H.*5.9.

2. A Writ of Entry *ſur* diſſeiſin *in le per, Brit. fo.* 264, *&c,* 5 *E.*3.216.

3. A Writ, &c. *en le per & cui*, as where *A.* being the feoffee of *D.* the diſſeiſor maketh a feoffment over to *B.* there the diſſeiſee ſhall have a Writ of Entry *ſur* diſſeiſin of lands, &c. in which *B.* had no entry but by *A.* to whom *D.* demiſed the ſame, who unjuſtly and without Judgment diſſeiſed the Demandant: Theſe are called *gradus*, degrees, which are to be obſerved, or elſe the Writ is abateable; for *ſicut natura non facit ſaltum, ita nec lex,* 22 *E.*3.1.*b.* F.*N.B.*192.

4. A Writ of entry *ſur* diſſeiſin *en le poſt*, which lieth when after a diſſeiſin the land is removed from hand to hand above the degrees. 14 *H.*4. 40. *vide, &c.*

No eſtate gained by wrong doth make a degree, and therefore neither abatement, intruſion, or diſſeiſin upon diſſeiſin, doth make a degree. Neither doth every change by lawful Title work a degree; as if a Biſhop or an Abbot, &c. diſſeiſe one and die, where his ſucceſſor is in by lawful Title, for though the perſon be altered, yet the Right remains where it was, *viz.* in the Church, and both of them ſeiſed in the ſame Right, &c. *An faciunt gradum de Abbate in Abbatem ſicut de hærede in hæredem? Et videtur quod non magis quam in computatione diſcenſus, quia etſi alternetur perſona, non propter hoc alternatur dignitas ſed ſemper manet*, Br. l. 4. f. 321.

If a diſſeiſor by Deed inrolled convey the land to the King, and the King by his Charter granteth it over, the diſſeiſee cannot have a Writ of *entre en le per & cui*, but in *le poſt*, for the Kings Charter is ſo high a matter of Record, as it maketh no degree, 22 *E.*3.-. F.*N.B.*191.*k.*

Alſo an eſtate of a Tenant by the Curteſie, or of the Lord by Eſcheat, or of an execution of an Uſe, by the Statute of 27 *H.* 8. or by Judgment or Recovery, or of any

others that come in in the poſt, work no degree, 5 *E.*2. *Entry* 66. 7 *E.*3.360.

But a Tenancy in Dower by aſſignment of the heir, doth work a degree, becauſe ſhe is in by her husband; but aſſignment of a Dower by a diſſeiſor worketh no degree, but is in the poſt, 36 *H.*6. *Dower* 30.

When the degrees are paſt, ſo as a Writ of Entry *in le poſt* doth lie, yet by event it may be brought within the degrees again; as if the diſſeiſor infeoff *A.* who infeoffs *B.* who infeoffs *C.* or if the diſſeiſor die ſeiſed, and the land diſcend to *A.* and from him to *C.* now are the degrees paſt; and yet if *C.* infeoff *A.* or *B.* now it is brought within the degrees again. 44 *E.* 3,4,5. 5 *H.*7.6.

If the diſſeiſor make * a leaſe for life, the remainder in * fee, Tenant for life dieth, he in the remainder is in the *per*, becauſe he now claimeth immediately from the diſſeiſor, and both theſe eſtates make but one degree, 50 *E.*3.27.

Note, there be divers other Writs of Entry, beſides this of Entry *ſur* diſſeiſin, as a Writ of *Entry ad Term' qui præter' in caſu proviſo, in conſim' caſu, ad com. legem, ſine aſſenſu capituli, dum fuit infra ætat' dum non fuit compos mentis, cui in vita, ſur cui in vita, Intruſion, ceſſavit, &c.* and that which hath been ſaid of one may be applied to all.

Sect. 387.

If a diſſeiſor make a leaſe to a man and his heirs, during the life of *I. S.* and the leſſee dieth living *I. S.* this ſhall not take away the entry of the diſſeiſee, becauſe he that died ſeiſed, had but a Freehold only, and heirs were added only to prevent an Occupant, for the heir in that caſe ſhall not have his age. *Pl.* 16 *El. Com. Banco. Lambs* Caſe, *Dyer* 8 *El.* 253. 7 *H.*4.46. 8 *H.*4. 15. 11 *H.*4.42. 17 *E.*3.48.

But if the Kings Tenant for life be diſſeiſed, and the diſſeiſor die ſeiſed, this diſcent ſhall not take away the entry of the leſſee for life, becauſe the diſſeiſor had but a bare eſtate of Freehold during the life of the leſſee. *

If

If the heir of the diſſeiſor die before he enter, the entry of the diſſeiſee is taken away; and yet in pleading, the ſecond heir ſhall make himſelf heir to the diſſeiſor, &c. 24 *E.*3.47. An Infant is diſſeiſed, and after cometh to full age.

*Sect.*388, *&c.*

En diſcents que tollent entry, il covient que celuy que mor' ſeiſie ad fee & franktenement al temps de ſon morant, ou fee tail & franktenement al temps, &c. fo.239.b.

Note, the Law doth ever give great reſpect to the eſtate of Free-hold, though it be but for term of life.

A deſcent in the collateral line doth take away the entry, as well as in the lineal.

Sect. 390.

A dying ſeiſed, and a deſcent and not a dying ſeiſed, and an Eſcheat doth take away the entry: for the diſcent is the worthier Title. But if the diſſeiſor die ſeiſed, and the heir of the diſſeiſor die without heir, the diſſeiſee cannot enter upon the Lord by Eſcheat. So as there is a diverſity as touching the diſcent, when after a diſcent caſt, the iſſue in tail dieth without iſſue, and when after a diſcent caſt, the heir in feeſimple dieth without heir, for he in the reverſion, or remainder upon a ſtate Tail, claimeth in above the ſtate Tail; but the Lord by Eſcheat claimeth in under the heir in feeſimple, 37 *H.*6.1.9 *H.*7.24.*b.*

*Sect.*391, 392.

Note, a diverſity btween a Right, for which the Law giveth a remedy by Action, and a Title, for which the Law giveth no remedy by Action, but by Entry only. For example; The Feoffor upon (* this caſe in) Condition, hath a Right to the land, * and therefore his entry may be taken away, becauſe he may recover his right by Action; but the Feoffor or Donor that hath but a condition, his Title of Entry cannot be taken away by any diſcent, becauſe he hath

no remedy by action to recover the land. And therefore if a diſcent ſhould take away his entry, it ſhould bar him for ever. 33 *Aſſ.*11,24. 21 *H.*6.17.

Alſo he that hath a Title to enter upon a Mortmain, ſhall not be barred by a diſcent. *Br.Mortmain* 6. 47 *E.*3.11.

And ſo it is, where a woman hath a Title to enter, *Cauſa matr. prælocuti,* 40 *Aſſ.*13.

And ſo it is where the Freehold in Law is caſt upon the Deviſee, and the heir before any entry made by the Deviſee, enter, and dieth ſeiſed.

And ſo it is of him that entreth for conſent to a Raviſhment. *P.*32 *El.Com.Ban. Martin Trotte* of *London,*41 *E.*3.14. *per Finchden. P.*1 *Ja.Com.Ban.*

To this may be added, as a like caſe, the Kings Patentee, before he enter &c.

Another reaſon, wherefore a diſcent ſhall not take away the entry of him that hath a Title to enter by force of a Condition &c. is, for that the Condition remains in the ſame eſſence that it was in at the time of the creation of it, and cannot be diveſted, or put out of poſſeſſion, as Lands and Tenements may.

*Sect.*393.

8 *E.*2.*Entr'* 75.24 *E.*3.40. 38 *Aſſ. p.*26. 11 *H.*4.11.7 *H.* 5.3. 36 *H.* 6. *Dower* 30.*fo.*241.*a. le heire endow la feme de le diſſeiſor,&c.*

If there be Lord, Meſne and Tenant, the Meſne doth grant to the Tenant, to acquit him againſt the Lord and his heirs, the Lord dies, his wife hath the Seigniory aſſigned to her for her Dower, and diſtraineth the Tenant; albeit the grant was to acquit him againſt the Lord and his heirs only, yet becauſe ſhe continued the eſtate of her husband, and the reverſion remained in the heir,, this grant of Acquittal did extend to the wife. 31 *E.*1.*Meſne* 55. *Nota,&c.*

If after the dying ſeiſed of the diſſeiſor the diſſeiſee abate, againſt whom the wife of the diſſeiſor recover by confeſſion

ſeſſion in a Writ of Dower, in that caſe though the diſcent be avoided, yet the diſſeiſee ſhall not enter upon the Tenant in Dower, becauſe the recovery was againſt himſelf: but if he had aſſigned Dower to her in *pais*, ſome ſay he ſhould enter upon her.

Donor in Tail reſerves 20 *s.* rent, and dies, the Donee takes wife, and dies without iſſue, the heir of the Donor enters and endows the wife, ſhe is ſo in of the eſtate of her huſband, that albeit the eſtate Tail be ſpent, and the rent reſerved thereupon determined, yet after ſhe be endowed, ſhe ſhall be attendant to the heir, in reſpect of the ſaid rent,

And ſo it is of Lord and Tenant, the wife that is endowed, ſhall be attendant for the due ſervices; but if any ſervices be incroached, albeit the incroachment ſhall bind the heir, yet the wife ſhall be Contributary but for the ſervices of right due, 10 *E.* 3. 26.

Nota, Albeit a diſſeiſor after a diſcent taketh to him but an eſtate for life; yet when the diſſeiſee doth enter upon him, he ſhall thereby diveſt the reverſion, for a Freehold is that whereupon a *Præcipe* doth lie; and therefore the entry of the diſſeiſee is as available in Law, as if he had recovered it in a *Præcipe*. And ſo it is if a diſſeiſor make a leaſe for life, and grant the reverſion to the King, &c. 25 *E.* 3. 48. *Pl. C.* 553. *Vide S.* 302, 388.

Sect. 394.

Si un feme ſeiſie de terre en fee, dont jeo aye droit & title dent' prent baron, & ont iſſue enter eux & puis la feme devie ſeiſie, & apres le baron devie, & liſſue enter &c. *en ceſt caſe jeo poy enter ſur le poſſ. pur ceo que liſſue ne vient à les tenements immediate per diſcent apres la mort ſa mere*, &c. *eins per le mort del pier*, 9 *H.* 7. 24. 37 *H.* 6. 1. An immediate diſcent may take away an entry for a time and immediately may be avoided by matter *ex poſt facto*. But if a dying ſeiſed take not away the entry of him that right hath at the time of the diſcent, it ſhall not by any matter *ex p. facto* take away his entry. If a diſſei-

for make a gift in Tail, the remainder in fee, and the Donee dieth without iſſue, leaving his wife *privement enſeint* with a Son, and he in the remainder enters, and after the Son is born who entred into the land, this diſcent ſhall not take away the entry of the diſſeiſee; becauſe the iſſue cometh not to the lands immediately by diſcent, &c.

Sect. 395.

Diſſeiſor enfeoff ſon pier en fee, & le pier mor' ſeiſie, &c. *eeſt ne tolla entry* &c. *Reg.* It is true that albeit a diſcent be caſt, and the entry of the diſſeiſee taken away, yet if the diſſeiſor cometh to the land again, either by diſcent or purchaſe of any eſtate of freehold which is implyed in the (&c.) the diſſeiſee may enter upon him, or have his Aſſize againſt him, as if no diſcent or mean Conveyance had been, *quia particeps criminis.* 15 *E.*4.23.*a.* 11 *E.*4.2. 18 *E.*4.25.*a.* 33 *H.*6.5.*b.* 34 *H.*6.11. 12 *H.*8.9.24 H.8.3.9. 18 *H.*8.5. 5 *H.*7.29. *Aſſ.*54.39 *E.*3.25, 26.

Sect. 396, 397.

Note, that *Aſſ.mort.Anteceſſ. non tenet inter conjunctas perſonas ſicut fratres & ſorores,* &c. for theſe are privy in blood, *Brac.l.f.* 261, 282. 29 *Aſſ.*11. *F.N.B.* 196.*b.*

Albeit the eldeſt ſon hath iſſue and dye, and after the yongeſt ſon or his heir enter, and many diſcents be caſt in his line, yet may the heirs of the eldeſt ſon enter in reſpect of the privity of the blood, and of the ſame claim by one Title; but otherwiſe it is if the Feoffee of the youngeſt ſon dye ſeiſed, &c. and admit that the youngeſt ſon be of the half blood to his brother, yet he is of the whole blood to his Father; and therefore if he enter by abatement (and ſo gain a fee ſimple) and die ſeiſed, it ſhall not bar his elder Brother of his entry. But if the eldeſt ſon enter, and gain an actual poſſeſſion and ſeiſin, then the entry of the youngeſt is a diſſeiſin, *Br.ent* 27.

Si le puiſne frere ent.apres le mort.le pier & mor. ſeiſie, &c. *leign. frere poit ent. ſur l'iſſue,* &c. *pur ceo que ambid.les freres*

claime

claime per m. le title, auterment eſt ou leigne frere ent.&c. *& puis eſt diſſeiſie per le puiſne frere,que mort.ſeiſee,*&c.

If the Father make a leaſe for life, and hath iſſue two Sons and dieth, and the Tenant for life dye, and the youngeſt Son intrude, and dye ſeiſed, this diſcent ſhall not take away the entry of the eldeſt: But if the Father had made a Leaſe for years,it had been otherwiſe, for that the poſſeſſion of the leſſee for years maketh an actual freehold in the eldeſt Son. *Fol.*243.*a.*22*E.*4.4.

If two Coparceners be, and they ſeverally preſent to the Ordinary, yet the Church is not litigious, becauſe they claim all by one Title. *Doct.and St.cap.*30.*fol.*117.

If upon a Writ *ad diem clau. extr.* the youngeſt Son be found heir, the eldeſt Son hath no remedy by the Common Law, becauſe they claimed by one Title; but otherwiſe it is if they claim by ſeveral Titles. But this is now holpen by the Statute of 2 *E.*6.*c.*8.

If two Parſons be in debate for Tythes which amount to above the fourth part, and one man is Patron of both Churches, no *Indicavit* doth lie,for that both Incumbents claim by one and the ſame Patron,2 *H.*7.12.*a.*

There is a great diverſity holden in our books, where one hath a colour or pretence of right, and when he hath none at all,2 *E.*2.*Baſtar.*19.21 *E.*3.34.22 *Aſſ.*85. 11 *E.*3.*Aſſ.*88. 21 *H.*6.14.11 *E.*3.*Age* 3.*Sect.*400.

*Sect.*398.

When one Coparcener enters generally, and taketh the profits,this ſhall be accounted in Law the entry of them both, and no deveſting of the moity of her ſiſter,21 *Aſſ.*19. 21 *E.*3.7.27.32.4 *H.*7.10. 16 *H.*7.4.*fo.*243.*b.*

If the privity of the Coparcenary be once deſtroyed, a dying ſeiſed ſhall take away entry,&c. 28 *Aſſ.*30.*Vide* 8.710.

*Sect.*399.

Filius natus,vel filia nata ex juſta uxore,appellatur in legibus Angliæ filius mulieratus,ſeu filia mulierata. Glanv.l.2.c.2. Bract.f.c.10.Brit ca.70.

Baſtardus dicitur à græco verbo Baſſaris, i. *Meretrix ſeu Concubina.* Vide S. 188 Fleta l. 1. c. 5. vide S. 380.

Manſeribus ſcortum, notho mœchus dedit ortum,
Ut ſeges è ſpica, ſic ſpurius eſt ab amica.

If the husband be within the four Seas, and the wife hath iſſue, &c. in that caſe, *filiatio non poteſt probari. Bract. lib.* 4. *fo.* 278, 279. 7 *H.* 4. 9. 43 *E.* 3. 10. 29 *Aſſ.* 54.

If the iſſue be born within a month, or a day after marriage, between parties of full lawful age, the Child is legitimate, 18 *E.* 4. 28. *fo.* 244. *a.*

It is holden that if the Mulier be within age at the time of the dying ſeiſed (of the Baſtard) that nevertheleſs he ſhall be barred, becauſe the iſſue of the Baſtard is in judgment of Law become lawful heir, and the Law doth prefer legitimation before the priviledge of infancy, *& juſtum non eſt aliquem poſt mortem facere baſtardum, qui toto tempore vitæ ſuæ pro legitimo habebatur,* 5 *E.* 2. *Diſcent, Br.* 49. 31 *Aſſ.* 18. 22. *Pl. Com. Stowels* Caſe, 10 *E.* 3. 2.

If a man hath iſſue a Son being Baſtard eigne, and a daughter, and the daughter is married, the Father dieth, the Son entreth and dieth ſeiſed, his ſhall bar the feme Covert, 13 *E.* 1, *Baſt.* 28. and the diſcent in this caſe of Services, Rents, Reverſions expectant upon eſtates tail, or for life, whereupon rents are reſerved, &c. ſhall bind the right of the Mulier, but a diſcent of theſe ſhall not drive them that right have to an action, 14 *E.* 2. *Baſt.* 26. So if the Baſtard die ſeiſed, and his iſſue endoweth the wife of the Baſtard, yet is not the entry of the Mulier lawful upon the Tenant in Dower for his right was barred by the diſcent. Sir *Ri. Lechfords* Caſe, *lib.* 8. 101, 102.

Aſſ. Mortdanc. lieth not between the Baſtard and the Mulier in reſpect of the proximity of blood, and the Baſtard being impleaded or vouched ſhall have his age. 21 *E.* 3. 34. *b.* 30 *Aſſ. p.* 7. 11 *E.* 3. *Age* 3. 5 *H.* 7. 2.

Sect. 400.

At a Parliament holden 20 *H.* 3. for that [illegible] certifie upon the

the Kings Writ, that the Son born before marriage is a Baſtard, was *Contra Com. formam Eccleſiæ; Rogaverunt omnes Epiſcopi, magnates ut conſentirent quod nati ante Matrimonium, eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis: Et omnes Comites, & Barones una voce reſpondent, Quod nolunt leges* Angl' *mutare', quæ hucuſque uſitatæ ſunt & approbatæ.* Stat. de *Merton* cap. 9. *Bract.* l. 5. fo. 410, 417. 10 Aſſ. pl. 20.

Note, that the Law more reſpecteth him, that hath a coulorable title, though it be not perfect in Law, than him that hath no title at all. *Vide S.* 39.

Sect. 401.

Eſt diverſity lou Baſtard continue la poſſeſſion tout ſa vie ſans interruption, & lou le mulier enter & interrupt', le poſſeſſion de tiel Baſtard. *Reg.* None ſhall enter but the Mulier, or ſome other by his commandment. *M.* 38 & 39 *El. Com. Ban. Vide* 31 *H.* 8. *ent cong. Br.* 23.

Omnis ratihabitio retrotrahitur, & mandato æquiparatur, 4 *H.* 7. *ca. Vide Sect.* 334.

But in the caſe of the Baſtard eigne, Gardein in Socage, or Gardein in Chivalry may enter, for they are no ſtrangers.

If an Infant make a Feoffment in fee, an eſtranger of his own head cannot enter to the uſe of the infant, for the State is voidable. But where an Infant, or a man of full age is diſſeiſed, an entry by a ſtranger of his own head is good and veſteth preſently the eſtate in the Infant or other diſſeiſee. So it is if Tenant for life make a Feoffment in fee, an Eſtranger may enter for a forfeiture in the name of him in the reverſion, and thereby the eſtate ſhall be veſted in him. *P.* 39 *El. Com. Banco per Cur.* 10 *H.* 7. 16. 7 *E.* 3. 69. 6 *E.* 3. 62 *per Thorp.*

If the Mulier enter upon the Baſtard, and the Baſtard recover the land in an *Aſſ.* againſt the Mulier, now is the interruption avoided, and if the Baſtard die ſeiſed, this ſhall bar the Mulier.

The

The poſſeſſion of the King when he hath no cauſe of ſeiſure ſhall be adjuged the poſſeſſion of him for whoſe cauſe he ſeiſed. 2 *Aſſ.* 9. *fo.* 245. *b. Vide*, &c.

And note, that the baſtard muſt enter *in vacuam poſſ.* and continue during his life, without interruption made by the Mulier. Acts without words may make an entry, but not words without an act, *viz.* an entry, &c. *Pl.* 91. *Parſon de Honylanes Caſe.* 35 *H.* 6. 24. 1 *E.* 3. 21 *E.* 4. 3. 21 *E.* 55. 4 *E.* 6. 21 *H.* 6. 9.

Sect. 402.

Nul laches ſer. adjudge en un Infant, lou diſcent eſt eſchue durant ſon nonage. 33 *E.* 3. *qu. imp.* 46. But in ſome other caſes Laches ſhall prejudice an infant, as if he preſent not to a Church within ſix months; for the Law reſpecteth more the priviledge of the Church (that the Cure be ſerved) than the priviledge of Infancy; and ſo the publick repoſe of the Realm concerning mens Freeholds and Inheritance ſhall be preferred before the priviledge, &c. in caſe of a Fine where the time begins in the time of the Anceſtor, *Pl.* 372. So non-claim of a Villain, of an Infant by a year and a day, who hath fled into ancient demeſne, ſhall take away the ſeiſure of the Infant; and if an Infant bring not an appeal of the death of his Anceſtors within a year and a day, he is barred of his appeal for ever, for the Law reſpects more liberty and life, than the priviledge of infancy; and note, that *Littleton* putteth his caſe, that an Infant ſhall enter upon a diſcent, when a ſtranger dieth ſeiſed, but he put it not ſo before in the caſe of the Baſtard *eigne*, *F.* Tenant in tail infeoffs *A.* in fee, *A.* hath iſſue within age and dieth; *B* abateth and dieth ſeiſed, the iſſue of *A.* being ſtill within age, this diſcent ſhall bind the Infant; for the iſſue in tail is remitted, and the Law doth more reſpect ancient right in this caſe, than the priviledge of an Infant that had but a defeaſible eſtate. 11 *E.* 4. 1. 2. *F.N.B.* 35. (35) *m.* And it is ſaid, if the King die, ſeiſed of lands, and the land diſcend to his Succeſſor, that this ſhall bind an Infant, for that the priviledge of an

Infant

Infant in this caſe holds not againſt the King. 35 *H.*6. 60. *fo.*246.*a.*

*Sect.*403.

Si bar' & feme come en droit ſa feme ont title & droit dentr,&c.*& Tenant del terre mor ſeiſie,*&c. Theſe words are general, but are particularly to be underſtood, *viz.* when the wrong was done to the wife during the Coverture; for if a feme ſole be ſeiſed of lands in fee, and is diſſeiſed, and then taketh husband; in this caſe the husband and wife, as in the right of the wife having right to enter, and yet the dying ſeiſed of the diſſeiſor in that caſe ſhall take away the entry of the wife after the death of her husband, and the reaſon is as well for that ſhe her ſelf when ſhe was ſole might have entred and recontinued the poſſeſſion; as alſo it ſhall be accounted her folly, that ſhe would take ſuch a husband, which would not enter before the diſcent. 9 *H.*7.24.2. 2 *E.*4.25. 7 *E.*4.7.*b.* 15 *E.*4.*Diſcent* 30.*Negligentia ſemper habet infortunium comitem. Laches le baron ne turnera la feme,* &c. *al prejudice.* Note a diverſity, alt'eit *Reg.* No Laches ſhall be accounted in Infants or feme Coverts, as is aforeſaid, for not entry or claim to avoid diſcents, yet Laches ſhall be accounted in them, for no performance of a condition annexed to an eſtate of land. For if a feme be infeoffed either before or after marriage reſerving a rent, and for default of payment a re-entry. In that caſe the Laches of the baron ſhall diſherit the wife for ever. 20 *H.*6.28.*b.*

And ſo it is of an Infant his Laches for not performing of a condition annexed to a State, either made to his Anceſtor or himſelf, ſhall bar him of the right of the Land for ever. 31 *Aſſ.p.*17.42 *E.*3.1.*Pl.Com.* 55.10 *H.*7.13 *H.*7.35 *H.*6.41. *Pl.*136.*b. Fleta lib.*2.*ca.*50.

If a man make a Feoffment in fee to another reſerving a rent and if he pay not the rent within a month, that he ſhall double the rent, and the Feoffee dieth, his heir within age, his Infant payeth not the rent, he ſhall not by this Laches forfeit any thing. But otherwiſe it is of a feme Covert, and the

the reaſon of this diverſity is, for that the Infant is provided for by the Statute. *Non current uſuræ contra aliquem infra ætatem exiſten',&c.* Stat.Mert.ca.5.

But that Statute doth not extend to a condition of a re-entry,which the Infant ought to perform,&c.

Sect.405.

If an Ideot make a Feoffment in fee, he ſhall in pleading never avoid it,&c. But upon an office found for the King the King ſhall avoid the Feoffment, for the benefit of the Ideot whoſe cuſtody the Law giveth to the King. 39 *H.*3.42.*b.Abb.* 5 *E.*3.70.*Brit.c.*28.*fo.*66.25 *Aſſ.p.*4. 35 *Aſſ.p.*10.32 *E.*3 *Scire fac.* 160.*Stanf.pr.*34.

Upon all which Books, there have been four ſeveral opinions concerning the alienation, or other act of a man that is *Non compos mentis,&c.*

1. That he may avoid his own act by entry, or plea.

2. That he may avoid it by writ,and not by plea.

3. That he may avoid it either by plea,or by writ; and of this opinion is *Fitzh.*in his *N.B.*202.

And 4. *Littleton* here is of opinion, that neither by plea, nor by writ, nor otherwiſe he himſelf ſhall avoid it, but his heir (in reſpect his Anc.was *non comp.&c.*) ſhall avoid it by entry, plea,or writ; for it is a maxim of the Common Laws, that the party ſhall not diſable himſelf. *Lib.*4. *fo.*126, 127. *Beverleys* Caſe. But this holdeth only in Civil cauſes, for in Criminal cauſes,as felony,&c.the act or wrong of a mad man, ſhall not be imputed to him, for that in thoſe cauſes,*actus non facit reum, niſi mens ſit rea,& furioſus ſolo furore punitur.*And ſo it is of an Infant until he be of the age of 14.*Fo.*347.*b.*

Alſo if the Father diſſeiſe the Grandfather, and make a Feoffment in fee, (&c.) without warranty, the Grandfather dieth, albeit the right deſcend to the Father, yet he cannot enter againſt his own Feoffment; but if he die, his Son ſhall enter and avoid the State of the Feoffee. 26 *Aſſ.*27. 21 *H.*7. 31.*Stanf.*16.*b.*8 *E.*3.2.*Corcn.*413,414,351.22 *E.*3.*ibid.*12.4. 2 *H.*7.

2*H.*7.2.3*E.*3.*enter Cong.Statham*,12 *E.*4.8.39*H.*6.4.*Abbr. Aſſ.* 89.39 *H.*6.43. 15*E.Diſcent* 30.

If lands be given to two, and to the heirs of one of them, he that hath the fee ſhall not have an action of waſte upon the Statute of *Glouc.* againſt the Joynt-tenant for life, but his heir ſhall maintain an action of waſte againſt him.

*Sect.*406,407,408.

A *Dum fuit infra ætat'* lieth as well for the Anceſtor himſelf after his full age,as for his heir.

And note, where an Infant diſſeiſor aliens the lands in fee, that if the diſcent be caſt,the Infant being within age,he may enter at any time, either within age or after his full age. And ſo it is if an Infant make a Feoffment, &c. he may enter, &c. and ſo in both caſes may his heir,43*E.*3.*Enter cong. vet.N.B.* 126.*b. F.N.B.*192.45*E.*3.21.

*Sect.*409. *fol.*248.*a.*

Tenant *in Capite* makes a feoffment in fee to the uſe of the feoffee and his heirs, until the feoffor pay 100 *l.* to him or his heirs, the feoffee dieth, his heir within age; now hath the King the Wardſhip of the body, and is intituled to the guard of the land. But if the feoffor pay the 100 *l.* according to the limitation, the Wardſhip is deveſted, both for the body and the lane: and ſo it is in caſe of a Condition, for the diſcent which is the cauſe of Wardſhip,is utterly defeated'; and,*Ceſſante cauſa,ceſſat Cauſatum,Dyer* 13 *Eliz.fo.*298,299. So as there is no difference, where the diſcent is diſaffirmed by a Right Paramount, as where the eſtate was never lawful (as in the caſe of an Infant) and where the diſcent is affirmed for a time, the eſtate being lawful, and being after defeated by matter *ex poſt facto*, by a title of Re-entry.

*Sect.*410.

Diſſeiſor ad iſſue & enter en Religion, &c. This diſcent ſhall not bar the entry of the diſſeiſee, for that the diſcent cometh

cometh by the Deed of the Father. And the Law reſpects the original act, and that is his entry into Religion, which is his own act, whereupon the profeſſion followed, whereby the diſcent happened; for *Cujuſque rei potiſſima pars principium eſt.* And, *Origo rei inſpici debet*, *Pl.*Dame *Hales* Caſes 6 *E.*3. 41,&c.

But it is ſaid in the caſe of a Baſtard eigne, and Mulier puiſne, ſuch a diſcent ſhall bind the Mulier, and ſuch an heir by diſcent ſhall have his age. 10 *E.*3.55. *fo.*248.*b.*

Nota, if a man be Tenant or Defendant in a real or perſonal action, and hanging the ſuit, the Tenant or Defendant enter into Religion; by this the Writ is not abated, becauſe it is by his own act. And ſo it is of a Reſignation, but otherwiſe it is of a Depoſition or Deprivation, becauſe he is expelled by Judgment, and yet his offence, &c. was the cauſe thereof. *Sed in præſumptione legis, judicium redditur in invitum*, 18 *E.*4.19. 9 *E.*4.25. 52. 7 *E.*4.15. *Bract. lib.* 4. *fol.*189.

Sect. 411.

No diſcent or dying ſeiſed can be of a Chattel.

A man ſeiſed of an Advowſon in fee, grants three Avoidance one after another, and after the Church becomes void, and the Grantor preſents, and his Clerk is admitted and inſtituted, and after the Church becomes void again, the grantee may preſent to the ſecond Avoidance, for that he was not put out of poſſeſſion thereof; for as the leſſor having the Freehold and Inheritance, cannot diſſeiſe his leſſee for years, having but a Chattel, that any diſcent may be caſt, to take away his entry: ſo in the ſaid caſe the Grantor hath the Franktenement and the Fee of the Advowſon rightfully, ſo as he cannot make any uſurpation, to gain any eſtate, &c. Alſo in reſpect of the privity, &c. the uſurpation of the Grantor cannot put the Grantee out of poſſeſſion for the two latter Avoidances, *Hill.* 18 *El. Com. Banco.*

Claim

Claim dæver terres pur terme d'ans, neſt pas expulſment de le franktenement del heirs que eſt eins per diſcent.

Sect. 412, 413.

Time of Peace is the time of Law and Right; and time of War is the time of Violent Oppreſſion, which cannot be reſiſted by the equal Courſe of Law, *Cum ſilent leges inter arma, fo.* 249. *b.*

Succeſſion of Bodies Politick or Corporate, is in the *poſt*, and the heir of the natural man is in the *per*, 7 *E.* 3. 25. *a.* 5 *E.* 3. 13. *&* 3.

A Body Politick is ſo called, becauſe it is to take in Succeſſion, framed (as to that capacity) by Policy; and it is alſo called a Corporation, or a Body incorporate, becauſe the perſons are made into a Body, and are of capacity to take and grant, &c. And this Body Politick or Incorporate may commence and be eſtabliſhed three manner of ways, *viz.* by Preſcription, by Letters Patents, or by Act of Parliament. Every Body Politique or Corporate is either Eccleſiaſtical or Lay; Eccleſiaſtical, either Regular, as Abbots, Priors &c. or Secular, as Biſhops, Deans, Archdeacons, Parſons, Vicars, &c. Lay, as Mayor and Commonalty, Bayliffs and Burgeſſes, &c. Alſo every Body Politick or Corporate is either Elective, Preſentative, Collative, or Donative; and again it is either ſole, or aggregate of many: And this Politick, &c. Body aggregate of many, is by the Civilians called *Collegium*, or *Univerſitas, lib.* 3. *fo.* 73. Dean and Chapter of *Norwich*.

CHAP.

CHAP. VII.

Continual Claim.

Sect. 414, *&c.*

SI diſſeiſee fait Continual Claim à les tenements in la vie le diſſeiſor comment que le diſſeiſor devie ſeiſie en fee, & la terre diſcendiſt à ſon heire, encore poit le diſſeiſor enter ſur la poſſeſſion le terre, &c. Nul poit fair Continual Claim, mes quant il ad title devant, &c. S. 416. And yet in ſome caſes a Continual claim may be made by him that hath right and cannot enter.

If Tenant for years, Tenant by Statute Staple, Merchant or Elegit, be ouſted, and he in the reverſion diſſeiſed, the leſſor or he in reverſion may enter to the intent to make his Claim, and yet his entry as to take any Profits, is not lawful during the Term: And the leſſor or he in the reverſion in that caſe may enter to avoid a collateral Warranty, or the leſſor in that caſe may recover in an Aſſize, and ſo (as ſome have holden) may the leſſor enter in caſe of a leaſe for life, to this intent, to avoid a Diſcent or a Warranty, *Dyer* 19 *El. Pl. Com.* 374. 15 *H.*7.3.4. *Jacobins* Caſe. 28 *H.* 6. 28. *S.* 442. 45 *E.*3.21.

If the diſſeiſee make continual Claim, and the diſſeiſor die ſeiſed within the year, his heir within age, and by Office, the King is entituled to the Wardſhip, albeit the entry of the diſſeiſee be not lawful, yet may he make continual Claim to avoid a diſcent, and ſo in the like caſe. 7 *H.*6.40. *Con. Claim* 1. *Dounclers* Caſe, 5 *E.*4.4.

No continual Claim can avoid a diſcent, unleſs it be made by him that hath Title to enter, and in whoſe life the dying ſeiſed was, 22 *H.*6.37.9 *H.*4. 5.*a.*15 *E.*4.22.*a.*

Sect.

*Sect.*415. *fol.*251.*a.*

A continual Claim may be made as well where the lands are in the hands of a feoffee,&c.by Title,as in the hands of a Disseisor,Abater or Intruder by wrong.

*Sect.*416.

Note, that a Forfeiture may be made by the alienation of a particular Tenant, either in *pais*, or by matter of Record.

1. In *pais* of lands and tenements which lie in Livery, where a greater estate is by livery, then the particular Tenant may lawfully make, whereby the reversion or remainder is divested, *vide S.*581,609, 610, 611. 17 *El.Dyer* 339. 16 *El. Dyer* 324.

A particular estate of any thing that lies in grant, cannot be forfeited by any grant in fee by Deed ; for that nothing passes thereby, but that which lawfully may pass. 33 *E.*3. *Devise* 21. 15 *E.*4.9. *vide S.*608.

But if Tenant for life or years of land, the reversion or remainder being in the King, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the King ; and the reason is in respect of the solemnity of the feoffment by livery, tending to the Kings disherison,35 *H.*6.62.*Tr.*32 *El.in Inform' de intrusion vers Robinson, Exchequers.*

2. By matter of Record,and that by three manner of ways; 1. By Alienation. 2. By Claiming a greater Estate than he ought. 3. By affirming the reversion or remainder to be in a Stranger.

1. By Alienation, and that either divesting, as by levying of a Fine,or suffering a Common Recovery of Lands, whereby the reversion or remainder is divested: or not divesting, as by levying of a fine in fee, of an Advowson, Rent Common, or any other thing that lieth in the Grant: And of this Opinion is *Littleton* in our Books; and so note two diversities, 1. Between a Grant by Fine (which is of Record) and

and a grant in deed by *pairs*; and yet in this they both agree, That the reverſion or remainder in neither caſe is diveſted. 2. Between a matter of Record, as a Fine &c. and a Deed recorded, or a Deed inrolled, for that worketh no forfeiture, becauſe the Deed is the Original, 15 *E.*4.9.

2. By Claim, and that may be in two ſorts; either Expreſs, as if Tenant for life, will in Court of Record claim fee, or if leſſee for years be ouſted, and he will bring an Aſſize, *ut de libero tenemento*: or Implyed, as if in a Writ of Right brought againſt him, he will take upon him to joyn the *Miſe* upon the meer Right, which none but Tenant in fee-ſimple ought to do. So if leſſee for years do loſe in a *Præcipe*, and will bring a Writ of Error, for Error in Proceſs, this is a Forfeiture 15 *E.*4.29. 36 *H.*6.29. 2 *H.*6.9.4 *El.Dyer* 9 *H.*5.14. 22 *Aſſ.*31. 18 *E.*3.28. 16 *Aſſ.*16.

3. By affirming the reverſion or remainder to be in a ſtranger, and that either actively or paſſively.

Actively by five manner of ways; as,

1. Tenant for life pray in aid of a ſtranger, whereby he affirms the reverſion to be in him.

2. If he Attorn to the grant of a ſtranger; and there note alſo a diverſity between an Attornment of Record to a ſtranger, and an Attornment in *pais*, for an Attornment in *pais* worketh no Forfeiture.

3. If a ſtranger bring a Writ of Entry *in caſu proviſo*, and ſuppoſe the reverſion to be in him, if the Tenant for life confeſs the Action, this is a Forfeiture.

4. If Tenant for life plead covinouſly, to the diſheriſon of him in the reverſion, this is a Forfeiture.

5. If a ſtranger bring an Action of Waſte againſt leſſee for life, and he plead *Nul waſte fait*, this is a Forfeiture, or the like, 21 *E.*3.24.*a.* 5 *E.*4.2. 24 *H.*8. *Forſ.br.*87.*lib.*2 *fo.*55,56. *Bucklers* Caſe. 4 *E.*3.68. 1 *H.*7.15 *Aſſ.*3.

Paſſively, as if Tenant for life accept a Fine of a ſtranger *Sur conuſans de droit come ceo*, &c. for hereby he affirmeth of Record, the reverſion to be in a ſtranger, 3 *M.Dyer* 248.

Note, that the Right of a particular eſtate may be forfeited

ed alſo, and that he that hath but a Right of remainder or reverſion, ſhall take benefit of the forfeiture, as if Tenant for life be diſſeiſed, and he levy a Fine to the diſſeiſor, &c. *fo.* 252. *a.* 13 *E.* 4. 4.

If Tenant for life make a leaſe for life, or a gift in Tail, or a Feoffment in fee, upon Condition, and enter for the Condition broken, yet the Forfeiture remaineth. So it is of Tenant in Tail, *apres poſſibilit'*, &c. *tenant per le Curteſie*, &c. Tenant for years, Tenant by ſtatute Merchant, &c. 39 *Aſſ.* 15. 43 *E.* 3. *Enter cong.* 30. 2 *H.* 5. 7. 39 *E.* 3. 16. 45 *E.* 3. 25.

If Tenant for life in remainder make continual Claim, and the Alienee of the firſt Tenant for life dye ſeiſed, then may he in the remainder for life enter, and the right of entry, which he gained by his entry, ſhall go to him in the remainder in fee, in reſpect of the privity of the eſtate. And ſo it is of him in the reverſion in fee, in like caſe, for he is alſo privy in eſtate.

If Tenant in Tail, the remainder in fee, with garr. have Judgment to recover in value, and dye before Execution, without iſſue, he in remainder ſhall ſue Execution, for he hath right thereunto, and is privy in eſtate. So if a Seigniory be granted to one by Fine, the grantee for life dieth, he in remainder ſhall have a *Per que ſervit'*, for he hath right to the remainder, and is privy in eſtate.

Sect. 417.

It is not ſufficient to tell one generally what he ſhould do, but to direct him how, and in what manner he ſhall do it.

Note, that the entry of a man to recontinue his Inheritance or Freehold, muſt enſue his Action for recovery of the ſame, *Mich.* 14. 15 *El. Rot.* 1458. in the Earl of *Arundels* Caſe, *Lib. fo.* 252. *b.*

But if a Diſſeiſor had letten ſeverally three Acres to three perſons for years, there the entry upon one of the leſſees in name of all the three acres, ſhall recontinue and reveſt all the three acres in the diſſeiſee, for that the diſſeiſee might have

have had one Aſſize againſt the diſſeiſor, becauſe he remained Tenant of the Freehold for all the three Acres, 7 *Aſſ.* 18. 12 *E.*4. 10. 36 *H.*6.27.32 *Aſſ. p.*1.

If I enfeoff one of one acre of ground upon Condition, and at another time I infeoff the ſame man of another acre in the ſame County upon Condition alſo, and both the Conditions are broken, an entry into one acre in the name of both is not ſufficient for that I have no right to the land, nor action to recover the ſame, but a bare Title. But an entry into one part of the land, in the name of all the land ſubject to one Condition, is good, although the parcels be ſeveral, and in ſeveral Towns: And ſo note a diverſity between ſeveral rights of entry, and ſeveral Titles of entry, by force of a Condition, 11 *H.*7.25. *Dyer* 16 *El.* 337.

En noſme de tout, &c. dont il ad Title d'Entry; here in a large ſence Title of Entry is taken for a Right of Entry.

If I bring an Aſſize of two acres, if I enter into one hanging the Writ, albeit it ſhall reveſt that only acre, yet the Writ ſhall abate. 5 *H.*7.7. 4 *E.*4.19. 12 *E.*4.11.*a.*

Sect. 418.

Nota. A man may make a feoffment of lands in another County, and make livery of ſeiſin within the view, albeit he might peacably enter and make actual livery, and ſo may he ſhew the Recognitors in an aſſize the view of lands in another County. But a man cannot make an entry into lands within the view, where he may enter without any fear (for it is one thing to inveſt, and another to deveſt) 38 *E.*3. 11. 38 *Aſſ.* 3. fo. 253.*a.*

If livery of ſeiſin be made of parcel of the Tenements, &c. in one Town, in the name of all, &c. All the ſaid Tenements &c. paſs by force of the ſaid livery, &c. *Arg. à minore ad majus*: if it be ſo in a Feoffment paſſing a new right, *à multo fortiori*, it is for the reſtitution of an ancient right, as the worthier and more reſpected in Law, which holdeth Affirmative. *Vide S.* 438.

Sect.

*Sect.*419.

Fear of impriſonment ſufficeth to avoid a Bond or a deed; for the Law hath a ſpecial regard to the ſafety and liberty of a man. But note a diverſity between a Claim or an Entry into Land, and the Avoidance of an act or deed for fear of Battery. 4 *E.*7.4.11 *H.*4.6 18 *Aſſ.*25. *vide* S.434.10. 2. *cap.*49. 13. *H.*4. *Dures* 2.

If a man hath Title to enter into any Lands or Tenements, if he dares not enter &c. for doubt of maiming, &c. if he goeth, and approach as near to the Tenements as he dare for ſuch doubt, and by word claim the lands to be his; this entry in Law is as forcible in Law, as an entry in Deed; and upon ſuch an entry in Law an aſſize doth lie, as well as upon an entry in Deed; and ſuch an entry in Law ſhall avoid a Warranty, &c. *vide* S.378.11 *H.*6.51.

But note a diverſity here, between an entry in Law and an entry in Deed; for that a Continual Claim of the diſſeiſee being an entry in Law, ſhall veſt the poſſeſſion and ſeiſin in him for his advantage, but not for his diſadvantage; And therefore if the diſſeiſee bring an Aſſize, and hanging the Aſſize he make Continual Claim, this ſhall not abate the Aſſize, but he ſhall recover damages from the beginning: but otherwiſe it is of an entry in Deed. *Vide* S.442. *Pl. Com.*39. *Parſon* of *Honylanes* Caſe.

Arg. ab autor' eſt fortiſſimum in lege. 38 *Aſſ.P* 13.

*Sect.*421,422.

Where a Continual Claim ſhall deveſt an eſtate, in any other perſon, in any lands or tenements, there he that maketh the Claim ought to enter into the land, or ſome part thereof: But where the Claim is to bring him that maketh it into actual poſſeſſion, there a Claim within the view ſufficeth; as upon a diſcent, the heir having the Freehold in Law, may claim land within the view to bring himſelf into actual poſſeſſion: and in that ſenſe is the opinion of *Hull*, and the Court to be intended, 9 *H*4, 5, &c. But yet the entry in-

to

to ſome parcel in the name of the reſidue is the ſureſt way, *vide S.* 177. & 11 *H.6.* (accord with *Littleton*) 51.

At the Common Law upon a fine or final Judgment given in a Writ of Right, the party grieved had a year and a day to make his claim. So the wife or heir hath a year and a day to bring an appeal of death, &c. After judgment given in a real action, the plaintiff within the year and day may have a *Habere fac' ſeiſinam*, and in an action of Debt, &c. a *Capias, fieri fac'*, or a *Levari facias.*

A Protection ſhall be allowed but for a year and a day and no longer, and in many other caſes. *Vid. S.* 385. 426. 14 *H.* 4. 36. 7 *E.* 3. 37. *Pl.* 356, 357. 367. *Brit. fo.* 45. *b.*

Sect. 423, 424, 426.

Il covient a luy que fiſt claime, &c. de faire un cl' deins cheſc' an & jour prochein apres cheſc' claime fait durant la vie ſon adverſarie, & donques a quecunque temps que ſon Adverſary mor. ſeiſie ſon entry ne ſer. toll per nul tiel diſcent. Brit. fo. 209. *Dy.* 17 *Eliz.* 345.

Si Diſſeiſor mor. ſeiſie deins l'an & jour, &c. per que les tenements diſcend a ſon heire, en ce' caſe l'enter le diſſeiſee e' toll, car l'an & le jour que aidroit le leſſee en tiel caſe, ne ſerre pris de temps de title dent. a luy accrue, mes tantſolement del temps de claime per luy fait en le maner avantd. & pur ceſt cauſe il ſerra bone pur tiel diſſeiſee pur faire ſon claime en auxi breve temps que il puiſſit apres le diſſeiſin, &c.

This in caſe of a diſſeiſor is now holpen by the Statute of 32 *H.* 8. *ca.* 33. For if the diſſeiſor dye ſeiſed within five years after the diſſeiſin, though there be no cont. claim made, it ſhall not take away the entry of the diſſeiſee, but after the five years there muſt be ſuch continual claim as was at the Common Law: but that Statute extended not to any Feoffee or Donee of the diſſeiſor immediate or mediate, but they remain ſtill at the Common Law. *Vide S.* 385. 422.

Sect.

Sect. 428, 429.

Item ſicome eſt dit en les caſes miſes, lou home ad title dentr' pur cauſe dun diſſeiſin, &c. mes la ley eſt, lou home ad droit dentr. par caſe d'aſc' aut' title, &c. Here is implyed abators or intrudors, and not only their diſſeiſors, but the feoffees or donees of diſſeiſors, abators or intrudors, or any other ſo long as the entry is cong. and here title is taken in his large ſenſe to include a right. *V. Sect.* 650, & 659.

Si tenant in tail immediate puis tiel claime continua ſon occupation en les tenements ceo eſt un diſſeiſin, &c. à celuy que fiſt tiel claime, & ſic par conſequens le tenant adonques ad fee ſimple.

Sect. 430, 431.

The diſſeiſee ſhall have an action of Treſpaſs againſt the diſſeiſor, and recover his damages for the firſt entry without any regreſs, but after regreſs he may have an action of Treſpaſs with a *Continuando*, and recover as well for all the mean occupation as for the firſt entry; and note that *Littleton* doth here include coſts within damages.

Ou il poit aver un breve ſur leſtat' 5 R. 2. ca. 7. *Suppoſant par ſon breve que ſon adverſary avoit entry en les terres, &c. celuy que fiſt le claim, &c. & par tiel action il recover ſes damages, &c. i. e.* that he ſhall recover damages for the firſt tortious entry, but not for the mean profits, though he made a regreſs. 37 *H.* 6. 35. 2 *E.* 4. 18. 21 *E.* 4. 5. 74. 38 *Aſſ.* 9. 44 *E.* 3. 20. 10 *H.* 7. 27. *Keilway* 1. *b.* And here note that alſo he ſhall recover his coſts of ſuit. 2 *E.* 4. 24. *b.* 9 *E.* 4. 4. *b.* 16 *H.* 7. 6. *a. Fo.* 257. *a.* One or more may commit a force, three or more may commit an unlawful aſſembly, riot or rout. A multitude is not reſtrained to a certain number, but left to the diſcretion of the Judges. A writ of forcible entry is grounded upon the Statute of 8 *H.* 6. *ca.* 9. and lieth where one entreth with force, or where he enters peaceably and detaineth it with force, or where he enters by force, and detaineth it by force; and in this action without any regreſs

the plaintiff ſhall recover treble damages, as well for the mean occupation, as the firſt entry by force of the Statute; and he ſhall recover treble coſts alſo. 3 *E.*4.19.24 *F.N.B.*248. *&c.* 11 *E.*4.11.*b.*6 *H.*7.12.22 *H.*6.57.

If three or four go to make a forcible entry, albeit one alone uſe the violence, all are guilty of force, 10 *H.*7. 12.

Note that there is a force implied in Law, as every treſpaſs, *& Reſcous & diſſeiſin* implieth a force, and is *vi & armis*, and there is an actual force, as with weapous, number of perſons, &c. and when an entry is made with ſuch actual force, an action doth lie upon the ſaid Statute. *Vide Sect.*240. 34 *H.*6.20.

*Sect.*433.

Qui per alium facit, per ſeipſum facere videtur.

If an Infant or any man of full age have any right of entry into any lands, any ſtranger to the uſe of the infant, &c. may enter into the lands, and this Reg. ſhall veſt the lands in them without any commandment, precedent or agreement ſubſequent. But if a diſſeiſor levy a fine with proclamation according to the Statute, a ſtranger without a Commandment, &c. within the five years cannot enter in the name of the diſſeiſee to avoid the fine; and that reſolution was grounded upon the conſtruction of the Statute of 4 *H.*7. *ca.*24. But an aſſent ſubſequent within the five years ſhould be ſufficient, *omnis enim ratihabitio, &c.* 7 *E.*3.69.11 *Aſſ.p.*11.39 *Aſſ.p.*18. 10 *H.*7.12.*a.*31 *H.*8. *entry donque & faux recovery* 29.*lib.*9 *fo.*106.*a. L.Audeleys* caſe 45 *E.*3. *Releaſe* 18. and *Breve* 589.20 *E.*3.62. *per Thorp.*

*Sect.*434.

Reg. It is true that where a man doth leſſe than the commandment or authority committed unto him, there the Act is void; and where a man doth that which he is authorized to do and more, there it is good for that which is warranted

and

and void for the reſt. *Impotentia autem excuſat legem.* 11 *H.* 4. 3. 12 *Aſs.* 24, 26. *Aſs.* 39. *V. S.* 419. 46. *E* 3. *petition* 18. 33 *H.* 6. 8. *Lex non permittit aliquod inconveniens.*

Albeit the Recluſe or Anchorite be ſhut up himſelf, &c. yet to avoid a diſcent, he muſt command one to make claim, and ſuch a recluſe ſhall always appear by Atturney in ſuch caſes, where others muſt appear in proper perſon. 43 E 3. 8. b. 30. a.

Sect. 436.

Quant home eſt in priſon & eſt diſſeiſe, & le diſſeiſor mor ſeiſe. &c. The diſſeiſee ſhall not be bound in this caſe, for that by the intendment of Law he is kept without intelligence of things abroad, and alſo that he hath not liberty to go at large to make entry or claim, or ſeek counſel; and ſo note a diverſity between a Recluſe, who might have intelligence, and a man in priſon. *Pl. Com.* 360. *Stowels* Caſe.

But if he be diſſeiſed when he is at large, and the diſcent is caſt during the time of his impriſonment, this diſcent ſhall bind him. 9 *H.* 7. 24. *Vide lib. fo.* 259. *a.*

Sect. 437.

Si tiel que eſt en priſon ſoit utlage en action de Debt ou Treſp', ou en appeal de Robbery, il reverta tiel utlage, per breve de Error.

Outlawries may be reverſed, either by plea, or by writ of Error. By plea when the defendant cometh in upon the *Capias utlagat', &c.* he may by plea reverſe the ſame for matters apparent, as in reſpect of a *Superſedeas*, omiſſion of proceſs, variance, or other matters apparent in the Record; and yet in theſe caſes ſome hold, that in another Term the defendant is driven to his writ of Error, 2 *E.* 4. 1. 4 *E.* 4. 10. 21 *E* 4. 73. 11 *H.* 7. 5. 21 *H.* 6. 50. 9 *H.* 4. 7. 3 *El. Dy.* 192. 2 *El.* 176. 37 *H.* 6. 19.

But for any matters in fact, as death, impriſonment, ſervice of the King, &c. he is driven to his writ of Error, unleſs it be in caſe of felony, and there *in favorem vitæ*, he may plead it. But albeit impriſonment be a good cauſe to reverſe an

outlawry, yet it muſt be by proceſs of Law *in invitum*, and not by conſent or covin; for ſuch impriſonment ſhall not avoid the outlawry, becauſe upon the matter it is his own act. 8*H.*4.7.21*H.*7.13.39*H.*6.1.5*H.*7.1.1*E.*4.2.27*H.*8.2.38 *Aſſ.p.*17. *V.S.*439.

*Sect.*438.

Auxi ſi un recovery ſoit per default vers tiel que eſt in priſon, il avoider' le judgement per breve d'Error, &c. For he ſhall have no writ of diſcent, becauſe the ſummons was according to Law by ſummoners and veiors, and the land taken into the Kings hand by the *Pernor. Fleta l.*6.*ca.*67.& 24. *W.* 2.*ca.*48.4*E.*2.*diſcent* 51.

Defalta, is legally taken for non-appearance in Court.

There be divers cauſes allowed by Law for ſaving a mans default. 1. By impriſonment. 2. *Per inundationem aquarum.* 3. *Per tempeſtatem.* 4. *Per pontem fractum.* 5. *Per navigium ſubſtractum per fraudem petentis; non enim debet quis ſe periculis & infortuniis gratis exponere, vel ſubjacere.* 6. *Per minorem ætatem.* 7. *Per defenſionem ſummonitionis per legem.* 8. *Per mortem Attornati ſi tenens in tempore non novit.* 9. *Si petens eſſoniatus ſit.* 10. *Si placitum mittatur ſine die.* 11. *Per breve de Warr' diei.* 3*H.*6.46. 38*E.*3.5. 12*H.*4.13. 5*H.*7.3. *F.N.B.*17. 4*H.*5.*challenge* 153.*Br.Saver default* 45.

Legally Records are reſtrained to the Rolls of ſuch only as are Courts of Record, and not the Rolls of Inferior, nor of any other Courts which proceed not *ſecundum legem & conſuetudinem Angl.Pl.*79.*b.m.*7.& 8*Dy.*242.17*E.*3.49.11*H.*4.26.*b.* 21*H.*6.34. *error Br.*73. 7*H.*7.4. 19*Aſſ.*7. *l.*4. *fo.*52. *Rawlins* Caſe, *Brit.cap.*17.*l.*6.*fo.*11. *Jentlemans* Caſe, & 30.45.*lib.*7. *fo.*30.*l.* 8.*fo.* 60.*b.*& 67.*a.fo.*260.*a.*

During the term wherein any judicial act is done, the Record remaineth in the breaſt of the Judges of the Court, and in their remembrance, and therefore the Roll is alterable during that term, as the Judges ſhall direct; but when that term is paſt, then the Record is in the Roll, admits no alteration

tion, averment or proof to the contrary. 7*H.*6.28. 19*H.*6.6.

If the Tenant or Defendant be in priſon, he ſhall upon motion by order of the Court be brought to the Bar, and either anſwer according to Law, or elſe the ſame being Recorded, the Law ſhall proceed againſt him, and he ſhall take no advantage of his impriſonment, 18*El.Dy.*353.3.*m.Dy.*129. *Pl.*232.*Seignior Barkleys* Caſe, 16*H.*7, 11.*b.*22*H.*8. *Record Er.* 65.39*H.*6.4.3*El.Dy.*187.*lib.*6.*fo.*15.*Edens* Caſe.

If a man in priſon ſhall not be bound by a recovery by default, for want of anſwer in Court of Record in a real action which is matter of record, *à multo fort.* a diſcent in the Country which is a matter of deed, ſhall not for want of claim bind him that is in priſon. *Quod in minori valet, valebit in majori; & quod in majori non valet, nec valebit in minori.* 7*H.* 6.18.8*H.*6.16. *V.S.*418.

A man in priſon by proceſs of Law is to be kept *in ſalva & arcta cuſtodia*: but yet, *Carcer ad homines cuſtodiendes, non ad puniendos dari debet.*

Sect. 439.

If a man be upon the Sea of *England*, he is within the Kingdom of *England*, *&c.* And yet *altum mare* is out of the juriſdiction of the Common Law, and within the juriſdiction of the Lord Admiral, 6 *R.*2.*Protect.*46.*V.S.*198,440,441,677.

And note, *Littleton* ſaith not, beyond the Sea, or *extra* 4 *Maria*, for a man *revera* may be *infra* 4 *maria*, and yet out of the Realm of *England*.

But *infra* 4 *maria*, or *extra*, is taken by conſtruction to be within the Realm of *England* or dominions of the ſame. 3 *R.* 3.*continual Claim* 13.4*E.*3 46.

If a man be out of the Realm, and a recovery is had againſt him in a *præcipe* by default, it ſeemeth that he ſhall not avoid the recovery; for by that means, a man might be infinitely delayed of his freehold and inheritance, whereof the Law hath ſo ſpecial regard; and few or none go over, but it is either of their own free will, or by ſuit, for what cauſe

ſoever and he is not in that caſe without his ordinary remedy, either by his Writ of higher nature, or by a *Quod ei deforceat.* But outlawry in a perſonal action ſhall be avoided in that caſe, *quia de minimis non curat lex,* and otherwiſe he ſhould be without remedy. *V. S.* 437. and note the diverſity between that caſe of the impriſonment, and this of being beyond Sea. *Fo.*260.*b.nota, &c.*

*Sect.*440.

Excuſatur quis quod clameum non appoſuerit,ut ſi toto tempore litigii fuit ultra mare quaque occaſione .Vetus & conſtans opinio. Bract.l.5.f.436.& 163. Brit.fo. 21.216. 26 H. 8.c.18. 5 & 6 E.6.ca.11.

By Certificate a thing done beyond Sea may be tried.*F.N. B.*196.29 *Aſſ.*11.*l.*7. *f.*26,27.*Calvins* Caſe. *Stat.*25 *E.*3. *de proditionibus* doth declare, that it is Treaſon by the Common Law to adhere to the enemies of the King within the Realm or without, if he be thereof probablement attaint of *overt fact*; and that he ſhall forfeit all his lands,&c. Certain it is, that for neceſſities ſake the adherence without the Realm muſt be alledged in ſome place within *England*; and if upon evidence they ſhall find any adherency out of the Realm, they ſhall find the delinquent guilty. 5*R.*2.*Tryal* 54. 35*H.*8. *ca.*2. *fo.* 261.*b.* * *Dyer* 360. *contr.* * When part of the act, eſpecially the original is done in *England*, and part out of the Realm, that part that is to be performed out of the Realm, if iſſue be taken thereupon, ſhall be tried here by twelve men,and thoſe twelve ſhall come out of the place where the Writ is brought: for example, it was covenanted by Indenture by Charter party,that a Ship ſhould ſail from *Blackney* Haven in *Norf.* to *Muttrel* in *Spain,* and there remain by certain days. 48*E.*3.3.11*H.*7.16.1*R.*3.4.

In an action of Covenant brought upon this Charter-party, the Indenture was alledged to be made at *Thetford* in *Norfolk,* and upon pleading the iſſue was joyned, whether the ſaid Ship remained at *Muttrel, &c.* and it was adjudged, That this iſſue ſhould be tried at *Thetford* where the Action

was

was brought, becauſe there the Contract took his Original, &c. *P.28 El. Conſtant. & Hughin, Ban. R. l. 6. fo. 47. Dowdales* Caſe.

An Obligation made beyond the Seas, may be ſued here in *England* in what place the Plaintiff will. 2 *E.* 2. *Oblig.* 15. Whether *Bourdeaux* in *France* be in *Iſlington* or no, is not traverſable. *Vide fo.* 261. *b.*

If a man be diſſeiſed before he go over Sea, or cometh into the Realm again before the diſcent, the diſcent ſhall take away his entry.

Sect. 441.

By the Statute of 4 *H.* 7. *cap.* 24. five years after Proclamations made upon the Fine, are given to him that right hath to make his claim, or purſue his Action, where the Common Law gave him but a year and a day; but this Statute extends only to Fines, and not to Non-claim upon a Judgment in a Writ of Right: and therefore the Statute of 34 *E.* 3. 16. which ouſteth Non-claim, only to Fines levied, extendeth not to a Judgment in a Writ of Right to this day; and therefore the Common Law in that caſe remaineth, &c. *viz.* that claim muſt be made within a year and a day after Judgment.

Alſo if a Fine be levied without Proclamations, or without ſo many as the Law requireth, then the Statute of Non-claim doth extend to ſuch a Fine. *L.* 3. *fo.* 44, *&c. Caſe del fines, l.* 1. *fo.* 96. *Shelleys* Caſe, *l.* 2. *f.* 93. *Binghams* Caſe, *l.* 8. *f.* 100. *Lechfords* Caſe, *l.* 91. *f.* 139, *&c. Beaumonds* Caſe, *l.* 10. *f.* 29. *b. Lampets* Caſe, *&* 99. *l.* 9. *f.* 105. *Margaret Podgers* Caſe, *l.* 5 *f.* 124. *Saffins* Caſe, *l.* 10. 96. *Seymors* Caſe, *l.* 8. *f.* 72. *Greyſleys* Caſe, *l.* 11. *f.* 65. 71. 78. *Pl. Com. Smith* and *Stapl.* Caſe, *Stows* Caſe, and *Howels* Caſe. *Bract.* 435. *Brit.* 216. *fo.* 262. *a.*

Finis finem litibus imponit.

A Feme covert, alſo they in reverſion or remainder expectant upon any eſtate of Freehold, are holpen by the Statute of 4 *H.* 7. *vide lib. fo.* 262. *b.*

Sect. 442.

In a writ of Entry *ſur* diſſeiſin againſt one, ſuppoſing that he had not entry but by *I. S.* who diſſeiſed him, the Tenant ſaid that *I.S.* died ſeiſed, and the land deſcended to him, and prayed his age: the Plaintiff counterpleaded his age, for that he arraigned an Aſſize againſt *S.* who died hanging the Aſſize, and he was ouſted of his age, for that the bringing of the Aſſize amounted to a Claim. 24*E.*3.25.9*E.*2.*Age* 141.

If Tenant in Dower alien in fee with Warranty, and the heir in the reverſion bring a writ of Entry in *Caſu proviſo, &c.* and hanging the plea, the Tenant dieth, the heir ſhall not be rebutted or barred by this Warranty, for that the *Præcipe* did amount to a continual Claim. 3 *E.*3.*Garr.*62. *Fleta l.*6. *c.*52. *Bract.l.*5.*fo.*436.*Fo.*263.*a. Nota, &c.*

If the goods of a Villain (before any ſeiſure, &c.) be diſtrained, the Lord may have a Replevin, and the very bringing of the Writ doth amount to a Claim of the goods, and veſteth the property in the Lord, 33*E.*3.*Repl.*43.42*E.* 3.18.*b.* 9 *H.* 6. 25. *Nemo debet rem ſuam ſine facto, aut defectu ſuo amittere.*

Sect. 443.

If an uſurpation be had to a Church in time of vacation, this ſhall not prejudice the Succeſſor to put him out of poſſeſſion, but that at the next avoidance he ſhall preſent. *F.N.B.* 34 *M.W.*2.*c.*5.*imp.excuſ.&c.*

When there is no Dean or Mayor, the Chapter or Commonalty in that caſe cannot make claim, becauſe they have neither ability nor capacity to take or to ſue any action. But during the vacation of the Abbathy of *D.* if a leaſe for life or a gift in Tail be made, the remainder to the Abbot of *D.* and his Succeſſors, this remainder is good, if there be an Abbot made during the particular eſtate. 2 *H.*7.13.40*Aſſ.*26.34 *E.*3. *Garr.*29.*Qu. de dubiis, &c.*

Inter cuncta leges, & percunctabere doctos. Hor.

As;

As, *Collatio peperit artes,* ſo *Collatio perficit artes.*
Creſcente ſcientia, creſcunt ſimul & dubitationes.
Autoritas Philoſophorum, Medicorum & Poetarum, ſunt in cauſis allegandæ & tenendæ, fo.264.a.

CHAP. VIII.

Of Releaſes.

*Sect.*444.

RElеaſes are of two ſorts, *viz.* a Releaſe of all the right which a man hath either in lands and tenements, or in goods and chattels. Or there is a Releaſe of actions real, of or in lands or tenements; or perſonal, of or in goods or chattels; or mixt, partly in the realty, partly in the perſonalty *vide S.*492.

Remiſ. Relax. & quiet. clamaſſe, are proper words of Releaſes, and be much of one effect; beſides there is *Renunciare, Acquietare,* and there be many other words of Releaſe, as if the Leſſor grants to the leſſee for life, that he ſhall be diſcharged of the rent, *vide S.*532.

Expreſs Releaſes muſt of neceſſity be by Deed. Releaſes in Law are ſometime by Deed, and ſometime without Deed. As if the Lord diſſeiſe the Tenant, and make a Feoffment in fee by Deed or without Deed, this is a Releaſe of the Seigniory. And ſo it is if the diſſeiſee diſſeiſe the heir of the diſſeiſor and make a Feoffment, &c. this is a Releaſe in Law of the right. And the ſame Law is of a right in action. 27*H.*8. 29.*Uſe* 34*H.*6.44.*Attaint,* 3 *E.*3.38.21*E.*4.21. *Pl.Com. Delamere.*

If the Obligee make the Obligor his Executor, this is a releaſe in the law of the action, but the duty remains, for

the which the Executor may retain ſo much goods,&c. 8 *E.*4. 3. 21 *E.*4.2.

If the feme Obligee take the Obligor to husband, this is a Releaſe in Law. So it is if there be two femes Obligees, and the one take the debtor to husband. 11 *H.*7.4.20 *H.*7.29. 8 *E.*4.3.

If an Infant make his debtor an Executor, this is a good Releaſe in Law of the Action. But if a feme Executrix take the Debtor to husband, this is no Releaſe in Law; for that ſhould be a wrong to the dead, and in Law works a *Devaſtavit*, which an act of Law ſhall never work. *M.* 30 & 31 *El.* adjudged.

Note a diverſity between a Releaſe in Deed, and a Releaſe in Law: for if the heir of the diſſeiſor make a leaſe for life, his right is gone for ever. But if the diſſeiſee doth diſſeiſe the heir of the diſſeiſor, and make a Leaſe for life, by this Releaſe in Law the right is releaſed but during the life of the Leſſee; for a Relaſe in Law ſhall be expounded more favourably, according to the intent of parties, than a Releaſe in Deed, which is the act of the party, and ſhall be taken moſt ſtrongly againſt him. 30 *E.*3.24.32 *E.*3.*Sc.fac.*102.

Jus, includeth not only a right, but alſo any Title or Claim, either by force of a Condition, Mortmain, &c. for the which no Action is given by Law, but only an entry.

*Sect.*446 *fol.*265.*a.*

Null droit paſſa per un releaſe; forſque le droit que le releſſor ad al temps del releaſe fait.

Note, a man may have a preſent right, though it take effect in poſſeſſion but *in futuro:* As he that hath a right to a reverſion or remainder; and ſuch a right he that hath it, may preſently releaſe, *Brit.fo.*101.

The Baron makes a Leaſe for life and dieth, the Releaſe made by the wife of her dower to him in reverſion is good, albeit ſhe hath no cauſe of action againſt him *in præſenti*, 16 *E.*3.*Bar.*245.*Hoes* Caſe, 5.*part fo.*70, 71.

If

If there be Grandfather, Father and Son, and the Son diſſeiſe the Grandfather and make a Feoffment in fee, the Grandfather dieth, the Father againſt his own Feoffment ſhall not enter; but if he dye his Son ſhall enter. And ſo note a diverſity between a Releaſe, a Feoffment, and a Warranty: A Releaſe in that caſe is void; a Feoffment is good againſt the Feoffor, but not againſt his heir; a Warranty is good both againſt himſelf and his heirs. 39 *H.*6.43. 21 *E.*4.81. 9 *H.*7. 1*b.* 2 *E.*3.38. 11 *H.*4.33.

Note three diverſities, 1. Between a Power, and an Authority or a Right. 2. Between Powers and Authorities themſelves. 3. Between a Right and a Poſſibility. 43 *E.*3.17. 42 *E.*3 24. *per Finchden*, 17 *E.*3.67.

As to the firſt, If a man by his Will deviſeth, that his Executors ſhall ſell his land, and dieth, if the Executors releaſe all their right and title to the heir, this is void; for they have but only a bare Authority. And ſo it is if *Ceſtuy que uſe* had deviſed, that his Feoffees ſhould have ſold the land; albeit they had made a Feoffment over, yet might they ſell the Uſe; for their Authority in that caſe is not given away by the livery. 15 *H.*7.11.

As to the ſecond, There is a diverſity between ſuch Powers and Authorities as are only to the uſe of a ſtranger, and nothing for the benefit of him that made the Releaſe (as in the caſe before) and a Power or Authority which reſpecteth the benefit of the Releaſor, as in theſe uſual powers of Revocation, when the Feoffor &c. hath a power to alter, change, determine or revoke the uſes (being intended for his benefit) he may releaſe; and where the eſtates before were defeaſible, he may by his Releaſe make them abſolute, and ſeclude himſelf from any alteration or revocation. *L.* 1. *Albanies* Caſe, 10 *H.*6.4.

As to the third, Before Judgment the Plaintiff in an Action of Debt releaſeth to the Bail in the Kings Bench all Demands, and after judgment is given, this ſhall not bar the Plaintiff to have execution againſt the Bail, becauſe at the time of the Releaſe he had but a meer poſſibility, and neither

neither *Jus in re*, nor *Jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be releaſed preſently.

So if the Conuſee of a Statute, &c. releaſe to the Conuſor all his right in the land, yet afterwards he may have Execution; for he hath no right in the land till Execution, but only a poſſibility. 25 *Aſſ. p.* 7. 27 *E.* 3. *Execut.* 130. *P.* 38 *El. Rot.* 521. *Borough* and *Grey*.

Sect. 447.

En Releaſes de tout le droit que home ad en cert' terres, &c. *il covient a celuy a que le releaſe eſt fait en aſcun caſe, que il ad le franktenement en les terres en fait, ou en ley al temps de releaſe fait*, &c. This muſt be intended of a bare right, and not of a releaſe of right, whereby any eſtate paſſeth, as to a leſſee for years, 49 *E.* 3. 28.

Alſo it muſt be intended of a right of Freehold at the leaſt, and not to a right to any term for years, or Chattels real; as if leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor maketh a leaſe for years, the firſt leſſee may releaſe unto him, all which is implied in the firſt, &c.

Alſo in ſome caſe a Releaſe of a right made to one that hath neither Freehold in deed nor in Law, is good; as the Demandant may releaſe to the Vouchee, and yet the Vouchee hath nothing in the Land, for that when the Vouchee enters into the Warranty, he becomes Tenant to the Demandant, and may render the land to him in reſpect of the privity; but an eſtranger cannot releaſe to the Vouchee, becauſe *in rei veritate* he is not Tenant of the Land, 7 *E.* 4. 13. 20 *H.* 6. 29. 5 *H.* 7. 41. 18 *E.* 3. 12. 8 *H.* 4. 5. *vide Sect.* 490, 491.

And ſo it is if the Tenant alien hanging the *Præcipe*, the Releaſe of the Demandant to the Tenant to the *Præcipe*, is good, and yet he hath nothing in the land, 20 *E.* 4. 14. 12 *Aſſ. p.* 41.

In time of vacation an Annuity that the Parſon ought to pay

pay, may be releaſed to the Patron in reſpect of the privity; but a releaſe to the Ordinary only ſeemeth not good, becauſe the Annuity is Temporal. 8 *E.* 3. 81. 46 *E.* 3. 6. *b.* 21 *H.* 7. 41.

If a diſſeiſor make a leaſe for life, the diſſeiſee may releaſe to him; for to ſuch a releaſe of a bare right there needs no privity. But if the diſſeiſor make a leaſe for years, the diſſeiſee cannot releaſe to him becauſe he hath no eſtate of freehold. And yet in ſome caſe a right of Free-hold ſhall drown in a Chattle, as if a feme hath a right of Dower, ſhe may releaſe to the Guardian in Chivalry, and her right of Freehold ſhall drown, becauſe the Writ of Dower doth lie againſt him, and the heir ſhall take advantage by it. And note, That by a Maxim, a right of entry or a choſe in action cannot be granted or transferred to a ſtranger. *Mirr. cap.* 2. *S.* 17.

If a man be diſſeiſed of an acre of land, the diſſeiſee hath *jus proprietatis*, the diſſeiſor hath *jus poſſeſſionis*; and if the diſſeiſee releaſe to the diſſeiſor, he hath *jus proprietatis & poſſeſſionis*, *&* *Reg.*

When a naked right to land is releaſed to one that hath *jus poſſeſſionis*, and the other by a mean title recovers the land from him, the right of poſſeſſion ſhall draw the naked right with it. For Example; if the heir of the diſſeiſor being in by diſcent, *A.* doth diſſeiſe him, the diſſeiſee releaſe to *A.* now *A.* hath the meer right to the land; but if the heir of the diſſeiſor enter into the land, and regain the poſſeſſion, that ſhall draw with it the meer right, &c. *Br. l.* 2. *fo.* 32. *Brit. fo.* 85. 121.

But if the Donee in Tail diſcontinue in fee, now is the reverſion of the Donor turned to a naked right: if the Donor releaſe to the diſcontinuee, and dye, and the iſſue in Tail recover the land, &c. he ſhall leave the reverſion in the diſcontinuee; for the iſſue in Tail can recover but the eſtate Tail only, and the Donor cannot have it againſt his releaſes, but if the diſſeiſee enter upon the heir of the diſſeiſor, and infeoff *A.* in fee, and the heir of the diſſeiſor recover the whole

eſtate,

eſtate, that ſhall draw with it the meet right, and leave nothing in the Feoffee.

Another diverſity is obſervable, when the naked right is precedent before the acquiſition of the defeaſible eſtate, for there the re-continuance of the defeaſible eſtate ſhall not draw with it the preceding right. As if the diſſeiſee diſſeiſe the heir of the diſſeiſor, albeit the heir recover the land againſt the diſſeiſee, yet ſhall he leave the preceding right in the diſſeiſee. So if a woman that hath right of Dower diſſeiſe the heir, and he recover the land againſt her, yet ſhall he leave the right of Dower in her. *5 Aſſ.* 1. 10 *Aſſ.* 16. 50 *E.* 3. 7. 30 *Aſſ.* 5. 11 *E.* 3. *Entry* 56.

Another diverſity is to be noted, when the meer right is ſubſequent, and tranſlated by act in Law, there albeit the poſſeſſion be recontinued, yet that ſhall not draw the naked right with it; as if the heir of the diſſeiſor be diſſeiſed, and the diſſeiſor infeoff the heir apparent of the diſſeiſee, being of full age, and then the diſſeiſee dieth, and the naked right deſcends to him, and the heir of the diſſeiſor recover the land againſt him, yet doth he leave the naked right in the heir of the diſſeiſee.

So if the diſcontinuee of Tenant in Tail infeoff the iſſue in Tail of full age, and then the diſcontinuee recover, &c. yet he leaveth the naked right in the iſſue, 12 *Aſſ.* 41 27 *E.* 3 84. 488. 23 *H.* 8, *Reſtore al action Br.* 5. *vide S.* 473, 475, 478, 487.

But if the heir of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſe to the diſſeiſor upon Condition, if the Condition be broken, it ſhall reverſe the naked right. And ſo if the diſſeiſee had entred upon the heir of the diſſeiſor, and made a Feoffment in fee upon Condition, if he enter for the Condition broke, and the heir of the diſſeiſor enter upon him, the naked right ſhould be left in the diſſeiſee. But if the heir of the diſſeiſor had entred before the Condition broken, then the right of the diſſeiſee had been gone for ever. 38 *E.* 3. 16. 9 *H.* 7. 24.

Sect.

Sect. 448.

Natural ſeiſin is the freehold in Deed, and the civil the freehold in Law. *Bract. l.* 4. *f.* 206, 236. *Brit. f.* 83. *b. Vide S.* 680.

If a man levy a fine to a man *Sur Con. &c. Com. ceo, &c.* or a fine *Sur Conuſan. de droit tantum*, theſe be feoffments of Record; and the Conuſee hath a freehold in Law in him before he entreth. 42 *E.* 2. 20. 10 *H.* 6. 14. 17 *E.* 3. 7, 8. 2 *E.* 3. 33.

Upon an exchange the parties have neither freehold in Deed nor in Law, before they enter; ſo upon a Petition the freehold is not removed until an entry. 11 *H.* 4 61. 21 *H.* 7. 12.

If Tenant for life by the agreement of him in the reverſion ſurrender unto him; he in reverſion hath a freehold in Law in him, before he enter. 32 *E.* 3. *Bar.* 262. 42 *Aſſ.* 13 *H.* 4. *Surr.* 10.

Upon a livery within view, no freehold is veſted before an entry. 31 *E.* 3. 12. *fo.* 266. *b.*

If a man do bargain and ſell land by Deed Indenture and inrolment, the freehold in Law doth paſs preſently, and ſo when uſes are raiſed by Covenant upon good conſideration. If a Tenant in a *Præcipe*, being ſeiſed of Lands in fee, confeſs himſelf to be a villain to a ſtranger, and to hold the land in villenage of him, the ſtranger by his acknowledgment is actually ſeiſed of the freehold and inheritance without any entry. 17 *E.* 3. 77. 18 *E.* 4. 25.

Sect. 449, 450, 451. *fo.* 267. *a.*

A releaſe of all the right may be good to him in reverſion, (or to him in remainder in deed, 7 *E.* 3. 54.) albeit he hath nothing in the freehold, becauſe he hath an eſtate in him. 7 *E.* 4. 13. 14 *H.* 4. 32. *b.* 41 *E.* 3. 17. 49 *E.* 3. 28 Caſe *tilt.*

For he to whom a Releaſe is made of a bare right in lands and tenements, muſt have either a freehold in Deed or in Law, in poſſeſſion, or a ſtate in remainder or reverſion in fee, or fee tail, or for life.

But

But note that the eſtate which maketh a man Tenant to the *præcipe*, is ſaid to be the freehold, 3 *E* 2. enter 2. *F.N.B.* 207. *E.*

Sect. 452. *Fo.* 267. *b,*

Note, that as a releaſe made of a right to him in reverſion or remainder, ſhall aid and benefit him that hath the particular eſtate for years, life, or eſtate tail: So a releaſe of a right made to a particular Tenant for life, or in tail, ſhall aid and benefit him or them in remainder. *Sils ceo point monſtre,*

The one cannot plead the Releaſe made to the other, without ſhewing of it, for that they are privy in eſtate.

There is a diverſity between ſeveral eſtates, in ſeveral Lands and ſeveral eſtates in one land; for if two Tenants in Common of Lands, grant a rent charge of forty ſhillings out of the ſame to one in fee, and the grantee releaſe to one of them, this ſhall extinguiſh but twenty ſhillings, for that the grant in judgment of Law was ſeveral: But if one be Tenant for life of lands, the reverſion in fee over to another, if they two joyn in grant of a rent out of the lands, if the grantee releaſe, either to him in the reverſion, or to Tenant for life, the whole rent is extinguiſhed; for it is but one rent, and iſſueth out of both eſtates.

Sect. 453. *Fo.* 268. *a.*

Note two diverſities, 1 Between a Seigniory or rent ſervice, and a rent charge: for a Signiory or rent ſervice may be releaſed, and extinguiſht to him that hath but a bare right in the land, in reſpect of the privity, between the Lord and the Tenant in right; for he is not only as Tenant to the avowry, but if he die, his heir withing age, he ſhall be in ward and if of full age he ſhall pay relief, and if he die without heir the land ſhall eſcheat. But there is no ſuch privity in caſe of a rent charge, for there the charge lieth upon the Land.

The ſecond diverſity is between a Seigniory, and a bare right

right to land: for a releaſe of a bare right to land to one that hath but a bare right, is void. But a releaſe of a Seigniory to him that hath but a right, is good to extinguiſh the Seigniory.

Nota; Seigniory, rent or right, either in *præſenti*, or in *futuro*, may be releaſed five manner of ways; and the firſt three without any privity, 1. To the Tenant of the freehold in deed or in Law. 2. To him in remainder. 3. To him in reverſion. The other two in reſpect of privity, as 1. Where the Lord releaſeth his Seigniory to the Tenant being diſſeiſed, having but a right and no eſtate at all. 2. In reſpect of the privity without any eſtate or right, as by the demandant to the vouchee, or donor to the donee, after the donee hath diſcontinued in fee, *vid. S.* 455 *l.* 10. *fo.* 48. *Lampets* caſe.

If the Lord hath accepted ſervices of the diſſeiſor, then the diſſeiſee cannot enforce the Lord to avow upon him, though his beaſts be taken, &c. 20 *H.* 6. 9. *b.* 2 *E* 4. 6. *a.*

But ſome do hold, that if there be Lord and Tenant, and the Tenant be diſſeiſed, and the diſſeiſee die without heir, the Lord accepts rent by the hands of the diſſeiſor, this is no bar to him; contrary it is, if he avow for the rent in Court of Record, or if he take a corporal ſervice, as homage or fealty; for the diſſeiſor is in by wrong, but if the Lord accept the rent by the hands of the heir of the diſſeiſor, or of his Feoffee, becauſe they be in by title, this ſhall bar him of his eſcheat, which is to be underſtood of a diſcent or a Feoffment, after the title of Eſcheat accrued; for if the diſſeiſor make a Feoffment in fee, or die ſeiſed, and after the diſſeiſee die without heir, then there is no eſcheat at all, becauſe the Lord hath a Tenant in by title, 7 *E.* 6. *Eſcheat Br.* 18. *F.N.B.* 140. 7 *H.* 4. 17. 2 *H.* 4. 8. 6 *H.* 7. 9. *vide Sect.* 566. Upon the Statute 21 *H.* 8. *ca.* 19. theſe four points are to be obſerved.

1. That the Lord hath ſtill election, either to avow according to the Common Law, or by force of the Statute, by reaſon of this word (May.)

2. Albeit

2. Albeit the purview of the act be general, yet all neceſſary incidents are to be ſupplied, and the ſcope and end of the act to be taken; and therefore though he need not to make his avowry upon any perſon certain, yet he muſt alledge ſeiſin by the hands of ſome Tenant in certain within 40 years.

3. That if the avowry be made according to the Statute, every plaintiff in the replevin, or ſecond deliverance, be he Termor or other, may have every anſwer to the avowry that is ſufficient; and alſo have aid, and every other advantage in Law, (diſclaimer only excepted) for diſclaim he cannot, becauſe in that caſe the avowry is made upon no certain perſon.

4. Where the words of the Statute be, If the Lord diſtrain upon the Lands and Tenements holden, yet if the Lord come to diſtrain, and the Tenant enchaſe the beaſts which were within the view, out of the land holden, and there the Lord diſtrain, &c. in judgment of Law the diſtreſs is lawful, and as taken within his fee and Seignory; and the Statute being made to ſuppreſs fraud, is to be taken by equity. *L. 9. fo. 136. Aſcoughs* Caſe, 27 *H. 8. fo. 4. 32 H. 8. ca. 2. l. 9. f. 36. Tacknals* Caſe, 34 *H. 8. Avow. Br. 113. l. 9. f. 22.* Caſe *d'Avow.* 11 *H. 7. 4. 34 H. 6. 18. 16 E. 4. 10. 21 H. 7. 40.*

Sect. 445. fo. 269.

Note a diverſity between a Releaſe of a Rent ſervice out of Land, and a releaſe of right to land. As if a leaſe be made to (F.) one for life reſerving to the leſſor and his heirs a certain rent.

If the Leſſee be diſſeiſed, and after the Leſſor releaſe to the leſſee and his heirs all the right which he hath in the Land, and after the leſſee enter, albeit in this caſe the rent is extinct, yet nothing of the right of reverſion ſhall paſs:

But admit that the Donee in tail, (in ſuch caſe) make Feoffment in fee, and the Donor releaſe unto him and his heirs, all the right in the Land, this ſhall extinguiſh the rent, becauſe the Lord muſt avow upon him, and yet the Tenant

int in Tail, after the Feoffment hath no right in the Land, ut the reaſon is in reſpect of the privity, and that the donor s by neceſſity compellable to avow upon him only, &c. 1 *H.*5. arr. 43. 14 *H.*4. 38. *l.*3. *fo.*29. *l.*6. 58. 10 *E.*3. 26. 48 *E.*3. 8. *b.* 31 *E.*3. *gard.* 116. 5 *E.*4. 3. 7 *E.*4. 27. 15 *E.*4. 13. *Trin.* 18 *El.* Sir Th. *Waits* Caſe in *Com. Banco. Nota, &c.*

Sect. 457, 458.

Si veray Tenant que eſt diſſeiſie, teign del Seign. per ſervice de Chivalry & mor' (ſon heir eſteant deins age) le Seign. avera & ſeiſer' le gard del heir: mes ſi tiel tenant fiſt Feoffment en fee, &c. auterment eſt. 12 *H.*4. 13. 36 *E.*3. *gard.* 10. 6 *H.*7. 9. 37 *H.*6. 1. 32 *H.*6. 27. 7 *E.*6. *gard. Br.*

There be four manner of Avowries for rents and ſervices, &c. *viz.*

1. *Super verum tenentem,* as in the caſe here put.

2. *Supra verum tenentem in forma prædicta,* as where a Leaſe for life, or a gift in tail be made, the remainder in fee.

3. Upon one as upon his Tenant of the Mannor, omitting (very) and this is when the Lord hath a particular eſtate in the Seigniory, and ſo ſhall the donor upon the donee, or leſſor upon the leſſee.

4. *Sur la matter, en la terre,* as within his fee and Seigniory. As where the Tenant by Knights ſervice maketh a Leaſe for life reſerving a Rent, and die, his heir within age, the Guardian ſhall avow upon the leſſee. 2 *H.*4. 24. 12 *E.*4. 42. 26 *H.*6. Avowry 17. 9 *El. Dyer* 257. 5 *H.*7. 11. 7 *E.*4. 24. 20 *E.*3. *avow.* 131. 47 *E.*3. *fo. ult.* 38 *H.*6. 23. Now by the Statute 21 *H.* 8. *c.* 19. The very Lord may avow as in Lands within his fee and Seigniory, without avowing upon perſon in certainty.

Note a diverſity, if Tenant in Tail make a Feoffment in fee, yet the right of the Tenant in Tail remains, and ſhall deſcend to the iſſue in tail. But when the Tenant in fee-ſimple make a Feoffment in fee, no right at all remains of his eſtate, but when the whole is transferred to the Feoffee. Alſo the Lord is not compellable in that caſe to avow upon the Feoffor, but if he will, as *Littleton* here ſaith, he may avow on the

the Feoffee, but ſo it is not in caſe of tenant in tail. *Fol.* 269. *b*,

Note a diverſity, between actions and acts which concern the right, and actions and acts which concern the poſſeſſion only; for a writ of cuſtoms and ſervices lyeth not againſt the Feoffor, nor a releaſe to him ſhall extinguiſh the Seigniory. So if a reſcous be made, an Aſſ. ſhall not lie againſt the Feoffor, and him that made the Reſcous, becauſe the Feoffee is Tenant and in Aſſ. the ſurpluſage incroached, ſhall be avoided; for theſe actions and acts concern the right, but of a ſeiſin and avowry which concern the poſſeſſion, it is otherwiſe; and if the Lord releaſe to the Feoffor, this is good between them, as to the poſſeſſion, and diſcharge of the arrerages; but the Feoffee ſhall not take benefit of it, for that, it extended but to the right. But the Feoffor ſhall plead a releaſe to the Feoffee, for thereby the Seigniory is extinct, as if the leſſee for life doth waſt, and grant over his eſtate, and the leſſor releaſe to the grantee, in an action of waſt againſt the leſſee, he ſhall plead the releaſe, and yet he hath nothing in the land; and ſo in waſt ſhall Tenant in Dower, or by the curteſie in the like caſe, and the vouchee, and the Tenant in *præcipe* after a Feoffment made, and ſo in a *contra formam collationis*.

Nota, &c. If there be Lord and Tenant, and the rent is behind for divers years, and the Tenant make a Feoffment in fee, if the Lord accept the ſervice, or rent of the Feoffee due in his time, he ſhall loſe the arrerages due in the time of the Feoffor; for after ſuch acceptance, he ſhall not avow upon the Feoffor, nor upon the Feoffee, for the arrerages due, &c. But in that caſe if the Feoffor dieth, albeit the Lord accept the rent or ſervice by the hand of the Feoffee due in his time, he ſhall not loſe the arrerages, for now the Law compelleth him to avow upon the Feoffee; and that which the Law compelleth him unto, ſhall not prejudice him. 4 *E.* 3. 22. 7. *E.* 3. 8. 7. *E.* 4 27. 29 *H.* 8. *avow. Br.* 111. *l.* 3. *fo.* 65. 66. *Pennants* caſe 7. H. 4. 14. 2. *E.* 4. 6. 3. 4. H. 6. 46. 47. *E.* 3. 4. *Vide lib*, &c.

Sell.

Sect. 459.

If a man make a leaſe for years, the Remainder for years; and the firſt leſſee doth enter, a releaſe to him in remainder for years is good to inlarge his eſtate. 22. E. 4. *Surr.* 6.

But if a leaſe be made to begin at *Michaelmas*, reſerving a rent, and before the day the leſſor releaſe all the right that he hath in the land, this cannot enure to inlarge the eſtate, but to extinguiſh the rent in reſpect of the privity. M. 39. & 40 *El. in Scacc.* Sir H. *Woodhouſe*, and Sir *Will. Paſton.*

A man grants the next avoidance of an advowſon to two, the one of them before the Ch. become void (for after it become void, it is but a thing in action) may releaſe to the other; for although the grantor cannot releaſe to them to increaſe their eſtate, becauſe their intereſt is future, and not in poſſeſſion; yet one of them to extinguiſh his intereſt may releaſe to the other in reſpect of the privity. *P.* 38. *El. Qu. imp. per Bennet, vers leveſque Norwich in Com. Ban.*

Note, that ſeeing leſſee for years hath *intereſſe termini*, before entry he may grant it over, albeit for want of an actual poſſeſſion, he is not capable of a releaſe to inlarge his eſtate, *Pl. Com.* 423.

But if a man make a leaſe for life, the remainder for life and the firſt leſſee dieth, a releaſe to him in remainder and his heirs, is good before he doth enter to inlarge his eſtate, for that he hath an eſtate of freehold in Law in him.

Sect. 460. and 461.

A releaſe to a Tenant at will is good, becauſe between them, there is a poſſeſſion with privity; but a releaſe to a Tenant at ſufferance is void, becauſe he hath a poſſeſſion without privity. 21 H. 1. 37. 2 E. 4. 1. b. 2. E. 4. 27. 8. 4. 16. 29. H. 6. *Rel.* 1. Fo. 270. b.

But if a man enter into Land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but he is a diſſeiſor, and then the releaſe to him is good; or if the owner conſent thereunto, then he

he is Tenant at will, and that way alſo the Releaſe is good. *Temps H.8.Tenant à vol.l.5.2 E.4.38.13 E.3.Aſſ.86.*

But there is a diverſity, when one cometh to a particular eſtate in land by the act of the party, and when by act in law for if the Guardian hold over, he is an Abator, becauſe his intereſt came by act in Law. 10 *E.4.9.10.*

Privity is fourfold: 1. Privies in eſtate, as between the donor and donee, leſſor and leſſee, which privity is ever immediate.

2. Privies in blood, as the heir to his Anceſtor, or between Coparceners, &c.

3. Privies in repreſentation, as Executors, &c. to the Teſtator.

4. Privity in tenure, as the Lord and Tenant, &c. which may be reduced to general heads, Privies in Deed, and Privies in Law. *Old N.B.117.137.l.4.fo.23. Walkers* Caſe, *l.4.f.123,&c. Vide S.454.*

Sect.462,& 463.

When a Feoffment is made to a future uſe, as to the performance of his laſt Will, the Feoffees ſhall be ſeiſed to the uſe of the Feoffor, and of his heirs in the mean time. And reaſon would, That ſeeing the Feoffment is made without conſideration, and the Feoffor hath not diſpoſed of the profits in the mean time, that by conſtruction and intendment of Law, the Feoffor ought to occupy the ſame in the mean time. And ſo it is when the Feoffor diſpoſeth the profits for a particular time *in præſenti*, the uſe of the Inheritance ſhall be to the Feoffor and his heirs as a thing not diſpoſed of, 35 *H.6. Subpœna* 22.15 *H.7.12.b.37 H.6.36.* 11 *H.4.52.* 7 *H.4.* 22. 1 *M.* 111. *Dyer.*

And note a diverſity between a Feoffment of lands at this day upon confidence, or to the intent to perform his laſt Will, and a Feoffment to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates, as he ſhall appoint by his laſt Will; for in the firſt caſe the land paſſeth by the Will, and not by the Feoffment; for after the Feoffment the

Feoffor

Feoffor was ſeiſed in Fee ſimple, as he was before: but in latter caſe the Will purſuing his power is but a direction of the uſes of the Feoffment, and the eſtates paſs by execution of the uſes which were raiſed upon the feoffment, but in both caſes the feoffees are ſeiſed to the uſe of the feoffor and his heirs in the mean time. *L. 6. fo.* 17, 18. Sir *Edw. Cleres* Caſe, *fo.* 271. *b.*

Note, uſes are raiſed, either by tranſmutation of the eſtate, as by Fine, Feoffment, Common Recovery, &c. or out of the ſtate of the owner of the land by bargain and ſale, &c. or by Covenant upon lawful conſideration, *Dillon* and *Freyns* Caſe, *l.* 1 &c. *fo.* 113.

There cannot be two uſes in *eſſe*, of one and the ſame land.

But if *A.* diſſeiſe one to the uſe of *B.* and doth bargain and ſell the land for money to *C.* *C.* hath an uſe, and here be two uſes of one land, but of ſeveral natures, the one, *viz.* upon the bargain and ſale to be executed by the Statute, and the other not. But ſince *Littleton* wrote, all uſes are transferred by Act of Parliament into poſſeſſion, 27 *H.* 8. *cap.* 10.

Sect. 464. *Fol.* 272. *a.*

By the Statute of 2 *H.* 5. *cap.* 3. *Stat.* 2. it is enacted, that in three caſes, he that paſſeth in an Enqueſt, ought to have lands, tenements to the value of 40 *s.* *viz.* 1. Upon Trial of the death of a man. 2. In Plea real between party and party. And 3. In Plea perſonal, where the debt, or (or and) the damages in the Declaration amount unto forty Marks. 28 *H.* 8. *Dyer fol.* 9. 9 *H.* 5. *fol.* 5. 15 *H.* 7. 13. *b.* 5 *Ex* 47. *a.*

The ſureſt conſtruction of a Statute, is by the rule and reaſon of the Common Law. Uſes were at the Common Law.

When the Law gives to any man any eſtate or poſſeſſion, the Law giveth alſo a privity, and other neceſſaries to the ſame.

Since

Since *Littletou* wrote, the ſaid Statute of 2 *H.* 5. is altered for where the Statute limited 40 *s.* now a later Statute hath raiſed it to 40 *l.* and ſo it ought to be contained in the *Ven. fac.* 27 *El. cap.* 6.

Nota, An uſe is a truſt or confidence repoſed in ſome other, which is not iſſuing out of the land, but as a thing collateral, annexed in privity to the eſtate of ths land, and to the perſon touching the land, *viz.* that *Ceſtuy que uſe* ſhall take the profit, and that the Terre-tenant ſhall make an eſtate according to his direction. So as *Ceſtuy que uſe* had neither *jus in re,* nor *jus ad rem,* but only a confidence and truſt, for which he had no remedy by the Common Law, but for breach of truſt, his remedy was only by *Subpœna* in Chancery. *Fortеſcue cap.* 25, 26, *&c. Pl. Com.* 352. *b.* in *Dalameres* Caſe, *&* 349 *b. l.* 1 *fo.* 121, 122, 127, 140. *Chudleys* Caſe, *l.* 2. *fo.* 58, 78. *l.* 6 *fo.* 64. *l.* 7 *fo.* 13. *&* 34. *Vide Forteſcue ut ante, &c.* How Jurors ſhall be returned, &c.

Sect. 465. *Fol.* 273. *a.*

It is a certain rule, That when a Releaſe doth enure by way of inlarging of an eſtate, that there muſt be privity of eſtate, as between leſſor and leſſee, donor and donee. *Fleta l.* 5. *cap.* 34. 15 *H.* 7. 14. 22 *E.* 4. 4.

But a Releaſe to him that *in rei veritate* (albeit there be privity in Law, and a tenancy in ſuppoſition of Law) hath no eſtate, cannot enure to him by way of inlargement, for how can his eſtate be inlarged that hath not any? *Vide Libr.*

If a Tenant by the Curteſie grant over his eſtate yet he is Tenant as to an action of Waſte, Attornment, &c. and yet a Releaſe to him and his heirs cannot enure to inlarge his eſtate, that hath no eſtate at all.

If I grant the reverſion of my Tenant for life to another for life, now ſhall not he have an action of Waſte. But if I releaſe to the grantee for life and his heirs, now he hath the Fee-ſimple, and ſhall puniſh the Waſte done after,

48 *E.*

48 *E.*3.16.*a. per Perſay* and *Finchden,* 41 *E.*3.17. *a.* 7 *E.*4. 17.

It is further to be obſerved, that to a releaſe which enureth by way of inlargement of the eſtate, there is not only required privity and an eſtate, but ſufficient words alſo in Law, to raiſe or create a new eſtate.

If a man make a leaſe to *A.* for term of the life of *B.* and after releaſe to *A.* all his right in the Land, by this *A.* hath an eſtate for term of his own life, for a leaſe for term of his life is higher in Judgment of Law, than an eſtate for term of another mans life, *vide* 16 *H.*6.*Releaſe* 45. 22 *E.*2. *Rel. Statham.*

Nota, when a releaſe doth enure by way of enlargement of an eſtate, no inheritance, either in fee-ſimple or fee-tail, can paſs without apt words of inheritance: But there is a diverſity between a Releaſe that enureth by way of *Mitter leſtate,* and by way of enlargement of the eſtate, 9 *El. Dyer* 263.

If there be three Joyntenants, and one releaſe to one of the other all his right; this enureth by way of *Mitter leſtate,* and paſſeth the whole fee-ſimple without theſe words (Heirs.) But if there be two Joyntenants, and the one of them releaſe all his right to the other, this doth not to all purpoſes enure by way of *Mitter leſtate,* for it maketh no degree, and he to whom the releaſe is made, ſhall for many purpoſes be adjudged in from the firſt Feoffor, and this releaſe ſhall veſt all in the other Joyntenant without theſe words (Heirs.) 40 *E.*3.41. 46*E.*3.19*H.*6.3.3*H.*6.5.10*E.*4.3.

But if there be two Coparceners, and the one releaſe all his right to the other, this ſhall enure by way of *Mitter leſtate,* and ſhall make a degree, and without theſe words (Heirs) ſhall paſs the whole fee-ſimple.

And note, that to a releaſe that enures by way of *Mitter leſtate,* there muſt be privity of eſtate at the time of the Releaſe. 37*H.*8.*Alienat.Br.*31.8*H.*4.8.40*Aſſ.*5.19.

If two Coparceners be of a rent, and the one of them take the Terre-tenant to husband, the other may releaſe to

her, notwithſtanding the Rent be in ſuſpence, and it ſhall enure by way of *Mitter leſtate*, and ſhe may releaſe alſo to the Terre-tenant, and that ſhall enure by way of extinguiſhment. But if ſhe releaſe to her ſiſter, and to her husband, it is good to be ſeen how it ſhall enure. *

Nota, Some Releaſes do enure by way of enlargement of eſtate, ſome by way of *Mitter leſtate*, ſome by way of *Mitter le droit*, by way of Entry and Feoffment, and ſome by Extinguiſhment, *vide Littl. fo.* 68, 69.

Sect. 467. *Fol.* 274. *a.*

Reg. He that hath a fee-ſimple at the time of the Releaſe made of a right &c. needeth not ſpeak of his heirs; for a releaſe of a right for a day is ſufficient, &c. But if a man be diſſeiſed of two acres he may releaſe his right in one of them, and yet enter into the other, *vide* 6 *E.* 3. 17. *alias* 6 *E.* 3. 17. 12 *E.* 3. *diſcent F.* 29.

So note a diverſity, between a releaſe of part of the eſtate of a right, and a releaſe of a right in a part of the Land.

Again, note two diverſities, 1. Between the quantity of the eſtate in a right, and the quality thereof, for albeit the diſſeiſee cannot releaſe part of the eſtate, yet may he releaſe his right upon condition, 4 *E.* 2. *Releaſe* 50. 43 *Aſſ.* 12. 17 *Aſſ.* 2. 31 *Aſſ.* 13. 21 *H.* 2. 4.

2. Diverſity is between a right, which is favoured in Law, and a condition created by the party which is odious in Law, for that it defeateth eſtates; and therefore if a condition be releaſed upon condition, the Releaſe is good, and the Condition void, *fo.* 274 *b.*

An expreſs Manumiſſion of a Villain cannot be upon condition, for once free in that caſe and ever free. Alſo an Attornment to a grantee upon condition, the condition is void, becauſe the grant is once ſetled. But this is to be underſtood of a condition ſubſequent, and not of a condition precedent, for in both caſes the condition precedent is good. But Letters Patents of Denization made to alien, may be either upon condition

condition ſubſequent or precedent, and ſo may the King make a Charter of Pardon to a man of his life, upon condition as is aboveſaid, *Rot. Parl.* 18 *H.* 6. 11. 29. *Ap. Guilliams* Caſe, 10 *E.* 3 *f.* 2. 3 *H.* 7. *f.* 6.

Sect. 469.

Lau home ad forſque droit a la terre, & nad riens in le reverſion ne in le remainder in fait; ſi tiel home releaſe tout ſon droit a un que eſt tenant de le franktenement, tout ſon droit e' ale, ſomment que nul mention ſoit fait de les heires celuy a que le releaſe eſt fait. To a releaſe of a right, made to any that hath an eſtate of Freehold in Deed or in Law, no privity at all is requiſite. Leſſee for life letteth the ſame land over to another for term of the life of his leſſee, the remainder to another in fee; A releaſe in this caſe by the firſt leſſor to the leſſee, doth not enure by way of *Mitter le droit*, for then ſhould he have the whole right, but as it were by way of extinguiſhment in reſpect of him that made the releaſe; and that it ſhall enure to him in the remainder, which is a quality of inheritance extinguiſhed, but yet the right is not extinct in deed.

Sect. 471. *Fo.* 275. *b.*

If a diſſeiſor make a leaſe for life, the remainder in fee, albeit to ſome purpoſes they are as one Tenant in Law, yet if the diſſeiſee releaſe all Actions to the Tenant for life, he in the remainder ſhall not take benefit of this releaſe, for it extendeth only to the Tenant for life, *l.* 8. *fo.* 148. *Edw. Altham's* Caſe.

Alſo if the diſſeiſor make a leaſe for life, and the diſſeiſee releaſe all Actions to the leſſee, this enureth not to him in the reverſion. And ſo our Author is to be underſtood of a releaſe of Rights, and not of a releaſe of Actions to the Tenant for life, as to or for the benefit of him in the remainder or reverſion.

Sect. 472. *fol.* 276. *a.*

If Tenant for life be diſſeiſed by two, and he releaſe to one of them, this ſhall enure to them both, for he to whom the releaſe is made, hath a longer eſtate then he that releaſeth, and therefore cannot enure to him alone to hold out his Companion, for then ſhould the releaſe enure by way of Entry and grant of his eſtate, and conſequently the diſſeiſor to whom the releaſe is made, ſhould become Tenant for life, and the reverſion reveſted in the leſſor, which ſtrange tranſmutation of eſtates in this caſe the Law will not ſuffer, 13 *E.* 4. *Diſcent*, *F.* 29.

But if leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the leſſee releaſe to the diſſeiſor, the diſſeiſee may enter, for the term of years is extinct and determined. And ſo it is if Donee in Tail be diſſeiſed by two, &c. But if the Kings Tenant for life be diſſeiſed by two, and he releaſe to one of them, he ſhall hold out his compa nion, for the diſſeiſor gained but an eſtate for life. So if two Joyntenants make a leaſe for life, and after to diſſeiſe the Tenant for life, and he releaſe to one of them, he ſhall hold out his companion, for the diſſeiſin was but of an eſtate for life.

If Tenant for life be diſſeiſed by two, and he in the reverſion and Tenant for life joyn in a releaſe to one of the diſſeiſors, he ſhall hold out his companion, and yet it cannot enure by way of entry and feoffment. But if they ſeverally releaſe their ſeveral Rights, it ſhall enure to both the diſſeiſors.

But here in *Littletons* Caſe, where Tenant in fee-ſimple is diſſeiſed by two, and releaſe to one of them; this for many purpoſes enures by way of entry and feoffment, and therefore he to whom the releaſe is made, ſhall hold out his companion, and be made ſole Tenant of the fee-ſimple. *Mes ſi un diſſeiſor infeffa* 2, *&c. auterment eſt.* For that the Feoffees are in by Title, and are preſumed to have a Warranty, which is much favoured in Law, and the diſſeiſors are meerly in by wrong, 21 *H.* 6. 41.

If

If two men do gain an Advowſon by uſurpation, and the right Patron releaſes to one of them, it ſhall enure to them both, for ſeeing their Clerk came in by admiſſion and inſtitution, which are judicial acts, they are not meerly in by wrong: for an uſurpation ſhall cauſe a Remitter, *F. N. B.* 31 *M.*

But if a releaſe for life be made, the remainder for life, the remainder in fee, and he in remainder for life diſſeiſe the Tenant for life, and then the Tenant for life dieth, the diſſeiſin is purged, and he in remainder for life hath but an eſtate for life. And ſo note a diverſity where the particular eſtate for life is precedent, and when ſubſequent, 19 *H.* 6. 21. 38 *H.* 6. 28 *Caſe de Occup.*

Where our Author putteth his caſe of one diſſeiſed, put the caſe that two joyntenants in fee be diſſeiſed by two, and one of the diſſeiſees releaſes to one of the diſſeiſors all his right, he ſhall not hold out his companion, becauſe the releaſe is but of the moity, without any certainty.

If a man be diſſeiſed by two women, and one of them take husband, and the diſſeiſee releaſe to the husband, this ſhall enure to the advantage of both the diſſeiſors, becauſe the husband was no wrong doer, but in a manner in by Title.

If two diſſeiſors be, and they make a Leaſes for life, and the diſſeiſee releaſe to one of them, this ſhall enure to them both, and to the benefit of the leſſee for life alſo: for he cannot by the releaſe have the ſole poſſeſſion and eſtate; for part of the eſtate is in another. And ſo it is if the diſſeiſors make a leaſe for years, &c.

But the mortgagee upon condition having broken the condition, is diſſeiſed by two, the mortgagor having Title of entry for the condition broken, releaſes to the one diſſeiſor, albeit they be in by wrong, yet the releaſe ſhall enure to them for two cauſes: 1 For that they are not wrong doers to the Mortgagor, but to the Mortgagee; and by *Littletons* caſe it appeareth, that wrong is done to him that made the Releaſe. 2. That he that makes the Releaſe, hath but a Title by force of a condition, and *Littletons* caſe is of a right.

Like Law is of an entry for Mortmain, or a conſent to Raviſhment, &c.

Sect. 473.

Note, that a releaſe by one whoſe entry is lawful to him that is in by wrong, ſhall purge and take away all mean eſtates and titles.

If *A.* diſſeiſe *B.* who infeoff *C.* with warranty, who infeoff *D.* with warranty, and *E.* diſſeiſe *D.* to whom *B.* releaſes, this doth defeat all the mean eſtates and warranty, *cauſa qua ſupra*, 11 *H.* 4. 33. 9 *H.* 7. 25. 2 *E.* 4. 16. 21 *E.* 4. 78. 12 *Aſſ.* 22. *vide* 3 *H.* 6. 38.

Sect. 474. *fo.* 276. *b.*

If the diſſeiſor make a leaſe for life, and the leſſee make a feoffment in fee, and the diſſeiſee releaſe to the Feoffee, this releaſe ſhall take away the entry of the diſſeiſor for the alienation which was made to his diſinheritance, he having the inheritance by diſſeiſin, ſo as he could have no warranty annexed to it, and Tenant for life forfeited his eſtate. But if the entry of the diſſeiſee were not lawful, it is otherwiſe; as the Book of 9 *H.* 7. 25. is, of an eſtate Tail, *mutatis mutandis*, *Vide l. fo.* 277. *a.*

Sect. 475.

Abate. *Vide N.B.* 115. *Brit. cap.* 51. *Bract. l.* 4. *cap.* 2.

Abatamentum, is an entry by interpoſition.

A Diſſeiſin is a wrongful putting out of him that is actually ſeiſed of a Freehold, and abatement is when a man died ſeiſed of an eſtate of Inheritance, and between the death and entry of the heir, an eſtranger doth interpoſe himſelf, and abate.

Intruſion, 1. properly is when the Anceſtor died ſeiſed of any eſtate of inheritance expectant upon an eſtate for life; and then Tenant for life dieth, &c. and a ſtranger doth interpoſe himſelf and intrude.

2. He that enters upon any of the Kings demeſns, and taketh

taketh the profits, is ſaid to intrude upon the Kings Poſſeſſions, *F.N.B.* 203. *Fleta l.* 4. *cap.* 30. *Pl. Com. caſe de Mynes.*

3. When the heir in ward enters at his full age without ſatisfaction for his marriage, the Writ ſaith *quod intruſit*, *F.N.B.* 141. *F.*

Deforciamentum, comprehendeth not only theſe aforenamed, but any man that holdeth Land, whereunto another man hath right, be it by diſcent or purchaſe, is ſaid to be a deforcer.

Uſurpation hath two ſignifications in the Common Law, one when an eſtranger that no right hath preſenteth to a Church, and his Clerk is admitted and inſtituted.

2. When any ſubject doth uſe without lawful warrant Royal franchiſe, he is good to uſurp &c.

Purpreſtura eſt, &c. generaliter quoties aliquid ſit ad nocumentum regii tenementi, vel regiæ viæ (vel alterarum publicar') vel civitatis, &c. Glanv. *l.* 9. *ca.* 11. Brit. *fo.* 28, 29.

And becauſe it is properly, when there is a houſe builded, or an incloſure made of any part of the Kings demeſn, or of an high-way, or a common-ſtreet, or publick-water, or ſuch publick things, it is derived of a French word *Pourpris*, which ſignifieth an incloſure, but ſpecially applied, as is aforeſaid by the Common Law. *Sic nota differentiam inter diſſeiſinam, Abatamentum, Intruſionem, deforciamentum, & uſurpationem, & purpreſturam.*

Sect. 476. *Fol.* 477. *b.*

But if the Feoffee upon condition make a Feoffment in fee over without any condition, and the diſſeiſee releaſe to the ſecond Feoffee, the condition is deſtroyed by the releaſe, before the condition broken or after; for the eſtate of the ſecond Feoffee was not upon any expreſs condition, as *Littleton* here putteth his caſe, and he may have advantage of the releaſe, becauſe it is not againſt his own proper acceptance, as *Littleton* ſpeaketh in the next Section, *L.* 1. *fo.* 147. *Mayowes* Caſe.

But if it be a wrongful title, ſuch a title is taken away by a releaſe. As if *A.* diſſeiſe *B.* to the uſe of *C.* *B.* releaſe to

A. this ſhall take away the agreement of C. to the diſſeiſin, becauſe it ſhould make him a wrong-doer, as if the diſſeiſor be diſſeiſed, the diſſeiſee releaſe to the ſecond diſſeiſee, this taketh away the right of the firſt diſſeiſor had againſt the ſecond; and a relation of an eſtate gained by wrong, ſhall never defeat an eſtate ſubſequent, gained by right, againſt a ſingle opinion, not affirmed by any other in our Books, 14 *H.* 8. 11. *per Portm.*

Si diſſeiſee releaſe al Feoffee ſur condition ceo n'amendra leſtate le Feoffee, &c.

Sect. 477. *fol.* 478. *a.*

Home navera advantage per un releaſe que ſerre enconter ſon propter acceptance, & encounter ſon grant dem' & coment que aſc' ont dit que lou entre de home eſt congeable ſur un tenant ſil releaſe a meſme le tenant, que ceo availoit a le tenant, ſicome il uſt entre ſur le tenant, & puis luy infeoffa, &c. ceo neſt pas voier en cheſc' cas. Car ſi le diſſeiſee, uſt enter ſur le Feoffee ſur condition & puis luy infeoffa donques eſt le condition tout defeat, mes il ne' pas void per aſc' tiel releaſe ſans entry fait, &c.

If *A.* and *B.* be joynt diſſeiſors, and *B.* grant a rent-charge, and the diſſeiſee releaſe to *A.* all his right, *A.* ſhall avoid the rent-charge, becauſe it was not granted by him, and ſo not within the reaſon of our Author.

If two diſſeiſors be, and they enfeoff another, and take back an eſtate for life or in fee, albeit they remain diſſeiſors to the diſſeiſee, as to have an Aſſa againſt them, yet if he releaſe to one of them, he ſhall not hold out his companion, becauſe their eſtate in the land is in by feoffment.

If there be two diſſeiſors, and they be diſſeiſed, and they releaſe to their diſſeiſor, and after diſſeiſe him, and then the diſſeiſee releaſe to one or both of them, yet the ſecond diſſeiſor ſhall re-enter; for they ſhall not hold the land againſt their own releaſe.

If a diſſeiſee releaſe to one of the diſſeiſors to ſome purpoſe, this ſhall enure by way of entry and feoffment; *viz.* as to hold out his companion. But as to a Rent-charge granted

ted by him, it ſhall not enure by way of entry and Feoffment for if the diſſeiſee had entred and enfeoffed him, the rent, charge had been avoided.

But it is a certain rule, that when the entry of a man is congeable, and the releaſe to one that is in by title (as here to the Feoffee upon condition is) it ſhall never enure by way of entry and Feoffment either to avoid a condition with which he accepted the land charged, or his own grant, or to hold out his companion.

And where it appeareth by our Authour that Acts done by the diſſeiſor ſhall not be avoided by the releaſe of the diſſeiſee; It is to be noted, that acts made to the diſſeiſor himſelf, ſhall not be avoided by the alteration of his eſtate by the releaſe of the diſſeiſee, as if the Lord before the releaſe had confirmed the eſtate of the diſſeiſor to hold by leſſer ſervices, the diſſeiſor ſhall take advantage of it, and ſo of eſtovers to be burnt in the houſe and the like. Law is of a warranty made unto him.

If an alien be a diſſeiſor and obtain letters of denization, and then the diſſeiſee releaſe unto him, the King ſhall not have the land, for the releaſe hath altered the eſtate and it is as it were a new purchaſe otherwiſe it is if the alien had been the Feoffee of a diſſeiſor. *Fo.* 278.b.

If the Lord diſſeiſe the Tenant, and is diſſeiſed, the diſſeiſee releaſe to the ſecond diſſeiſor, yet the Seigniory is not revived, for between the parties, the releaſe enures by way of entry and Feoffment as to the land; but not having regard to the Seigniory: and for that the poſſeſſion was never actually removed, or reveſted from the diſſeiſor, who claimeth under the Lord, the Seigniory is not revived. But if the Lord, and the ſtranger diſſeiſe the Tenant, and the diſſeiſee releaſe to the ſtranger, there the Seigniory by operation of Law is revived, for the whole is veſted in the ſtranger, which never claimed under the Lord; and in that caſe if the Lord had died, and the land had ſurvived, the Seigniory had been revived.

Sect.478.fol.479.a.

Note, that where the Law in one caſe, doth give a man ſeveral remedies and in ſeveral kinds, there is a great art and knowledge for him to chuſe his apteſt remedy. 28*E.*3.98.9*E.*4.46.21*E.*4.55.41*E.*3.10.2*H.*4.12.41 *E.*3.

A man makes a gift in tail, the remainder in fee, Tenant in tail dieth without iſſue, an eſtranger intrudes, and he in remainder brings a Formedon, and recovered by default, and makes a Feoffment in fee, the intrudor reverſe the recovery in a writ of Deſceit and Entry, he ſhall detain the Land for ever; and the Feoffee ſhall not have a writ of Right. And ſo likewiſe if a diſſeiſor die ſeiſed, and a ſtranger abate, and the diſſeiſee releaſe to him, the heir of the diſſeiſor ſhall enter, and detain the land for ever. 9*H.*7.24.

Dormit aliquando jus, moritur nunquam; Right may be trodden down, but never trodden out; for where it hath been ſaid, that a releaſe of right doth ſome ways enure by way of extinguiſhment; it is ſo to be underſtood, either (as *Littleton* doth here) in reſpect of him that makes the releaſe, or in reſpect that in conſtruction of Law, it enureth not alone to him to whom it is made, but to others alſo, who be eſtrangers to the Releaſe, which as hath been ſaid, is a quality of an inheritance extinguiſhed.

As when the heir of the diſſeiſor is diſſeiſed, and the diſſeiſor make a Leaſe for life, the remainder in fee, if the firſt diſſeiſee releaſe to the Tenant for life, this is ſaid to enure by way of extinguiſhment, for that it ſhall enure to him in remainder, who is a ſtranger to the releaſe, and yet in truth the right is not extinct, but doth follow the poſſeſſion, *viz.* The Tenant for life hath it during his time, and he in remainder to him and his heirs, and the right of inheritance is in him in the remainder. 14*H.*8.6.*b.*

*Sect.*479, & 480.

Here *Littleton* putteth a diverſity between releaſes, which enure by way of extinguiſhment againſt all perſons, and whereof

whereof all perſons may take advantage; and releaſe which in reſpect of ſome perſons enure by way of extinguiſhment, and by other perſons by way of *mitter le droit*. Or between releaſes which indeed enure by extinguiſhment, for that he to whom the releaſe is made, cannot have the thing releaſed; and releaſes which having ſome quality of ſuch releaſe, are ſaid to enure by way of extinguiſhment; but in troth do not, for that he to whom the releaſe is made, may take the thing releaſed. 11*H.*7.25.37*H.*6.*barr.*39.38*E.*3.10.

And here *Littleton* putteth caſes, where releaſes do abſolutely enure by extinguiſhment; as 1. Of the Lord and Tenant; for the Tenant cannot have ſervice to be taken of himſelf, nor one man can be both Lord and Tenant. 2. A man cannot have land, and a rent iſſuing out of the ſame land. 3. A man cannot have land, and a common of paſture iſſuing out of the ſame land. *Fo.*280. *a.*

The Meſne being a feme enter-marry with the Tenant peravail, if the Lord releaſe to the feme, the Seigniory only is extinct, but if he releaſe to the husband, both Seigniory and Meſnalty are extinct; "And in this caſe if the Lord releaſe to "the husband and wife, it is a queſtion how the releaſe ſhall "enure; but it is no queſtion but that a releaſe may be made "to a Meſnalty, or a Seigniory ſuſpended in part of the e-"ſtate. 19*H.*6.19.

The Lord may releaſe his Seigniory to the Tenant of the land for life or in tail, *& ſic de cæteris*. But ſo cannot one releaſe a right or an action, &c. 13*E.*3.*Extinguiſhment.Br.*45. and *voucher F.*120.

Note, that by the releaſe of all his right in the Seigniory or the Land, the whole Seigniory is extinct without any words of inheritance. 12*H.*4. *Releaſe* 21.18*E.*2.*ibid.*5. 26*H.* 8.57.41*Aſſ.*6.

If there be Lord and Tenant by fealty and rent, the Lord granteth the Seigniory for years, and the Tenant attorn, the Lord releaſe his Seigniory to the Tenant for years, and to the Tenant of the land generally, the whole Seigniory is extinct, and the ſtate of the leſſee alſo. But if the releaſe

had

had been to them and their heirs, then the leſſee had had the inheritance of the one moity, and the other moity had been extinct. *Vide lib. &c.*

Sect. 481, 482.

Here it appeareth by *Littleton*, That if a man make a leaſe for life, the remainder in fee, and Tenant for life ſuffer a recovery by default, that he in remainder ſhould not have a Formedon by the Common Law: for *Littleton* ſaith, that he had not any remedy before the Statute. Neither is there any ſuch Writ in that caſe in the Regiſter, albeit in ſome Books mention is made in ſuch a Writ, *W.* 2. *ca.* 5. 34 *E.* 3. *Formedon* 31. 11 *E.* 3. *ib.* 31. 8 *E.* 3. 59. *F.N.B.* 117. *b.* 7 *H.* 7. 13.

Mes ſi celuy en le remainder uſt enter ſur le Tenant pur vie & luy diſſeiſiſt, & apres tenant enter ſur luy, & apres tenant pur terme de vie, per tiel recovery perde per default & mor' ore celuy en remainder bien poit aver breve de Droit envers celuy que recovera, pur ceo que le miſe Seigniory joine ſolement ſur le mere droit, &c.

Here a diſſeiſin gotten by wrong and defeated by the entry of him, that right hath, is ſufficient to maintain a Writ of Right againſt the recoveror in this caſe; for albeit the ſeiſin is defeated, between the leſſee for life, and him in the remainder yet having regard to the recoveror, who is a meer ſtranger, and hath no title, it is ſufficient againſt him. But otherwiſe it is, againſt the party himſelf, that defeateth the ſeiſin, and the Law is propenſe to give remedy to him that right hath. 7 *E.* 2. 62. 38 *E.* 3. 37. *Jur. ut.* 1.

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of the heirs of *A.* *A.* dieth, *B.* enters and dieth, a ſtranger intrudeth, the heir of *A.* ſhall have a Writ of Right of the ſeiſin, which *A.* had as Tenant for life. *Fo.* 281. *a.*

If lands be given in tail to *A.* the remainder to his right heirs, *A.* dieth without iſſue the collateral heir of *A.* ſhall have a Writ of Right of the ſeiſin of *A.* 4 *E.* 3. 16, 17.

And ſo note a diverſity between a ſeiſin to cauſe *poſſeſſ. fra-*

tris,

ris, &c. for there is required a more actual ſeiſin, and a ſeiſin to maintain a Writ of Right. 40*E.* 3. 8. 42*E.* 3. 20. 37 *Aſſ.* 4. (14) *E* 4. 24. 7*H.* 5. 4. 11*H.* 4. 11.

Sect. 483, 484.

Note a diverſity; where the iſſue taken goeth to the point of the writ or action, there *modo* and *forma*, are but words of form; as in *Littletons* Caſe of the writ of entry in *caſu proviſo*, and ſo is the (&c.) well explained in this Section.

But otherwiſe it is, when a collateral point in pleading is traverſed, as if a feoffment be alleadged by two, and this is traverſed *modo* and *forma*, and it is found the feoffment of one, there *modo* and *forma* is material. So if a feoffment be pleaded by deed, and it is traverſed *abſque hoc quod feoffavit modo & forma* upon this collateral iſſue, *modo & forma* are ſo eſſential, as the Jury cannot find a feoffment without deed. 9*H.* 6. 1. 40*E.* 3. 35. 21*E.* 3. 4. 22. *F.N.B.* 205, 206. *g* 40*E.* 3. 5. 32 *H.* 8. *Iſſue Br.* 80. 12 *E.* 4, 4.

Here is another diverſity to be obſerved, that albeit the iſſue be upon a collateral point, yet if by the finding of part of the iſſue, it ſhall appear to the Court, that no ſuch action lieth for the plaintiff, no more than if the whole had been found, there *modo & forma* are but words of form, as here in the caſe which *Littleton* putteth of the Lord and Tenant appeareth. 10*E.* 4. 7. 8*E.* 4. 15, 20. & 21*E.* 4. 3. *Marlbr. cap.* 3.

If the matter of the iſſue be found it is ſufficient, and this rule holds in criminal cauſes. *Pl. Com.* 101. *v.* 6*E.* 3. 41. *b.* 9*H.* 7. 3. 13*H.* 7. 14. 8*E.* 3. 70. 8 *Aſſ.* 29. & 39. 5*H.* 4. 22. 7*H.* 4. 11. *Pl. Com.* 92. 3 *Mar. Dyer* 115, 116. 40*E.* 3. 35. 31*E.* 3. *Account* 58. 28 *Aſſ.* 48.

The leſſee covenants with the leſſor not to cut down any Trees, &c. and binds himſelf in a bond of 40 *l.* for performance of covenants; the leſſee cuts down ten Trees, the leſſor brings an action of Debt upon the Bond, and aſſigneth a breach that the leſſee cutteth down twenty Trees, whereupon iſſue is joyned, and the Jury find that the leſſee cut down ten,

judg-

judgment ſhall be given for the Plaintiff, for ſufficient matter of the iſſue is found for the Plaintiff.

Sect. 485, 486.

An aſſault, battery, or taking of goods, &c. alledged in another county, cannot be traverſed without ſpecial cauſe of juſtification, which extendeth to ſome certain place; as if a Conſtable of a Town in another county arreſt the body of a man that breaketh the peace, there he may traverſe the county (but he muſt not reſt there) but all other places ſaving in the Town whereof he is Conſtable.

And ſo it is of taking of goods, the Defendant juſtifies for damage feiſant in another county, he muſt as before traverſe.

But where the cauſe of the juſtification is not reſtrained to a certain place, that is ſo local as it cannot be alledged in any other Town, &c. then albeit the action be brought in a forraign county, yet he muſt alledge his juſtification in the county where the action is brought.

In an action upon the caſe, the Plaintiff declared for ſpeaking ſlanderous words, which are tranſitory, and laid the words to be ſpoken in *London*, the Defendant pleaded a concord for ſpeaking of words in all the counties of *England* ſaving in *London*, and traverſed the ſpeaking of the words in *London*: the Plaintiff in his Declaration denied the concord, whereupon the Defendant demurs, and Judgment, &c. for the Plaintiff. *Tr.* 30. *El. Kings Bench, Inglebert* and *Jones, & C. Pleu. Paſch.* 38 *El. Rot.* 1656.

It is an ancient Principle in Law, That for tranſitory cauſes of action, the Plaintiff might alledge the ſame in what place or County he would.

It is better that it be turned to a default, than the Law ſhould be changed, or any innovation made, 2 *H.* 4. 18. 38 *E.* 3. 1.

A man did grant a rent, that the grantee ſhould hold the diſtreſs againſt gages and pledges, and yet he ſhall gage delivery, for otherwiſe by this new invention all Replevins

vins ſhall be taken away, 4 *E.* 3. *cap.*5. 4 *H.*4. *cap.*2.

Where the Jury is bound to find as well local things in many caſes, as tranſitory in other Counties, *Vide lib.*6. *fol.*46. *Dowdales* Caſe, 3 *E.*3. *Aſſ.*446. 14 *H.*4.35. 5 *H.* 5. 2. 37 *H.*6.2. 7 *E.*4.45. 18 *E.*4.1. 13 *H.*7.17. 2 *Mar.Br. att.*104. 20 *El. Dyer* 171. 19 *H.* 6. 48. 28 *H.* 8. *Dyer* 29. 12 *H.* 8. 1.

Reg. By the Common Law, if the Defendant hath cauſe of juſtification or excuſe, then can he not plead Not guilty, for then upon the evidence it ſhall be found againſt him, for that he confeſſeth the battery, and upon that iſſue cannot juſtifie it, but he muſt plead the ſpecial matter, and confeſs and juſtifie the battery.

If in battery the Defendant may juſtifie the ſame to be done of the Plaintiffs own aſſault, he muſt plead it ſpecially, and muſt not plead the general iſſue; and ſo of the like.

In treſpaſs of breaking his cloſe, upon Not guilty, he cannot give in evidence, that the Beaſts came through the Plaintiffs hedge, which he ought to keep, nor upon the general iſſue juſtifie, by reaſon of a rent-charge, Common, &c. 25 *H.* 8. *Br.*

In Detinue, the Defendant pleaded *non detinet*, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but muſt plead it; but he may give in evidence a gift from the Plaintiff, for that proveth he detaineth not the Plaintiffs goods. 22 *H.*6.33.20 *El. Dyer* 276. 2 *M. Dyer* 212.

If two men be bound in a bond joyntly, and the one is ſued alone, he may plead matter in abatement of the Writ, but he cannot plead *Non eſt factum*, for it is his Deed, though it be not his ſole deed, *lib.*5 *fo.*119. *Whelpdales* Caſe, *vide, &c. fo.*283. *a.*

Reg. Whenſoever a man doth any thing by force of a Warrant or Authority, he muſt plead it.

But all that hath been ſaid muſt be under two cautions;

1. That whenſoever a man cannot have advantage of the ſpecial matter by way of pleading, there he ſhall take advantage

vantage of it in the evidence: For example, the Rule of Law is, That a man cannot juſtifie in the killing or death of a man, and therefore he ſhall be received to give the eſpecial matter in evidence, as that it was *ſe defendendo, &c.*

2. That in any Action upon the Caſe, Treſpaſs, Battery, or of falſe Impriſonment againſt any Juſtice of Peace, Mayor, or Bayliff of City, &c. in any his Majeſties Courts in *Weſtminſter* or elſewhere, concerning any thing by any of them done by reaſon of any of their Officers aforeſaid, and all other in their aid or aſſiſtance, or by their Commandment, &c. they may plead the general iſſue, and give the ſpecial matter for their excuſe or juſtification in evidence, 7 *Jac. c.* 5. 23 *H.* 8. *cap.* 5.

Probationes debent eſſe evidentes (i. e.) *perſpicuæ & facile intelligi.*

If the Treſpaſs were done the 4 of *May*, and the Plaintiff alledgeth the ſame to be done the 5. of *May*, or the 1. of *May*, when no treſpaſs was done, yet if upon the evidence it falleth out that the Treſpaſs was done before the action brought, it ſufficeth, 19 *H.* 6. 47. 5 *E.* 4. 5. 21 *E.* 4. 66. And *Littleton* ſaith, That the Jury may find the Defendant guilty at another day than the Plaintiff ſuppoſeth.

Note, That the Law of *England* reſpecteth the effect and ſubſtance of the matter, and not every nicety of form or circumſtance. *Qui hæret in litera, hæret in Cortice, & apices juris non ſunt jura.*

Sect. 487. *Fo.* 283. *b.*

Note a diverſity, when the poſſeſſion is firſt, and then a right cometh thereunto, the entry of him that hath right to the poſſeſſion ſhall gain alſo the right, 50 *E.* 3. 78. *Vide S.* 447.

But when the right is firſt, and then the poſſeſſion cometh to the right, albeit the poſſeſſion be defeated (as here in *Littletons* Caſe it is by the heir of the diſſeiſor) yet the right of the diſſeiſee remaineth, *A.* dieth ſeiſed, and the Land deſcendeth to *B.* his Son, before he enter, an eſtranger abate and

and dieth ſeiſed, *B.* enter, againſt whom the heir of the Abator recovers in an Aſſize, *B.* may have a Writ of *Mortdan.* and recover the land againſt him. And if the diſſeiſin had been done to *A*, &c. then after the recovery in the Aſſize *B.* ſhould have had a Writ of Entry in the *per*, becauſe the heir that is in by diſcent, is in the *per*.

Sect. 490, & 491.

En præcipe quod red'. If the Tenant alien the land, hanging the Writ, *& puis le Demandant releaſe a luy tout ſon droit, &c. cel releaſe eſt bone, pur ceo que il eſt ſuppoſe terre-tenant per le ſuit del Demandant, & uncore il nad riens en la terre al temps de releaſe fait. Item ſi en præcipe, &c. le tenant vouch, & le vouchee entre en garr' ſi apres le Demandant releaſe, &c. al vouchee, ceo eſt aſſets bone, pur ceo que apres le vouchee avoit entre en le arr' il eſt tenant en ley al Demandant, &c.*

But if after the vouchee hath entred into Warranty, and become Tenant in Law, an Anceſtor collateral releaſe to the vouchee with Warranty, he ſhall not plead this againſt the Demandant, for that the releaſe by the eſtranger is void. 10 *E.* 4. 13. 12 *Aſſ.* 41. 7 *E.* 3. 6. 8 *H.* 7. 5. *Dyer* 17 *El.* 341. *Sect.* 447.

Sect. 492. *Fol.* 285. *a.*

Nota, there be two kinds of actions, *viz.* concerning 1. *Placita Coronæ*, or *Placita Criminalia*. 2. *Placita Communia, ſeu Civilia*. Of Actions concerning Common Pleas, *quædam ſunt ad rem, quædam in perſonam, & quædam mixtæ*, Vide S. 444. *Actio nihil aliud eſt quàm jus proſequendi in judicio quod ſibi debetur*. Or *Action neſt auter choſe que loial demand de ſon droit*. And by the releaſe of all actions, cauſes of action be releaſed, but within a ſubmiſſion of all actions to Arbitrement, cauſes of action are not contained, *lib.* 8. 153. *Althams* Caſe, 35 *H.* 8. *Dyer* 57. 5 *Mar.* 217. 36 *H.* 6. 8. *vide* 42 *E.* 3. 22, 23.

Note a diverſity: A man by his own act cannot alter the nature of his Action; and therefore if the leſſee for life or years

years do waſte, now is an action of Waſte given to the leſſor, wherein he ſhall recover two things, *viz.* the place waſted, and treble damages. But by act in Law the nature of the action may be changed; as if a man make a leaſe *pur terme d'auter vie*, and the leſſee doth waſte, and then *Ceſtuy que vie* dieth, an action of Waſte ſhall lie for damages only, becauſe the other is determined by act in Law. 14 *H.*8.14. 23 *H.* 8. *Br. Waſte.*

And again hereupon is another diverſity to be obſerved, that in caſe when an action is well begun, and part of the action determined by act in Law, and yet the like action for the reſidue is given, there the Writ ſhall not abate, but proceed. But where by the determination of part, the like action for the reſidue remaineth not, there the action well commenced ſhall abate. 9*E.*4.50.

But if Tenant *pur auter vie* bring an Aſſize, and *Ceſtuy que vie* dieth, hanging the Writ, albeit the Writ were well commenced, yet the Writ ſhall abate, becauſe no Aſſize can be maintained for damages only. Alſo an action of Waſte muſt be *ad exhæreditatem*, 2H.4.22. 6*E.*2. *breve* 807. *vide, &c.*

If a Writ of Annuity be brought, and the Annuity determineth, hanging the Writ, the Writ faileth for ever, becauſe no like action can be maintained for the arrearages only, but for the annuity and arrearages, 34*H.*6.10. 9*E.*4.39. 14 *H* 7.31.

But where damages only are to be recovered, there albeit by act in Law, the like action lieth not afterwards, yet the action well commenced ſhall proceed; as if a Conſpiracy be brought againſt two, and one of them die hanging the Writ, it ſhall proceed, 22*R.*2. *breve* 888. 18*E.*4.1. And in an Aſſize of *No. Diſſ.* a Writ of Annuity, *Qu. Imp.* and other mixt actions, a releaſe of actions reals is a good plea, and ſo it is of a releaſe of actions perſonals, 2 *H.*4.13. 9 *H.* 6.57.

But if three Joyntenants be diſſeiſed, and they arraign an Aſſize, and one of them releaſe to the diſſeiſor all action per-

perſonals, this ſhall bar him, but it ſhall not bar the other Plaintiffs, for having regard to them, realty ſhall be preferred, *& omne majus trahit ad ſe minus dignum.* 30 *H6. Barre* 59. 45 *E.3. fo.6.*

So it is in a Writ of Ward brought by two, &c.

Nota diverſit. In real Actions where damages are not to be recovered by the Common Law, as in an Aſſize, &c. but are given by the Statute, there a releaſe of all actions perſonals is no bar, as in the Writ of Dower. *Entry ſur diſſeiſin in le per, &c. Mordanc. Aiel, &c. Mert. cap.1. Dower, Glouc. cap.1.*

Sect.493,494. fo.258.b.

A Releaſe of actions perſonals is a good bar in a *Qu. Imp.* becauſe it is a mixt action. 22 *H.6.27.b.*

A diſſeiſor that hath nothing in the land, may plead a releaſe of actions perſonals, becauſe damages are to be recovered againſt him, 11 *Aſſ.9.* 18 *E.3.2.23,24.*

And the Tenant in an Aſſize ſhall plead a releaſe of actions perſonals to the diſſeiſor, for that plea proveth that the Plaintiff hath no cauſe of action againſt him, 13 *H.4.2.a.*

If the diſſeiſee releaſe to the diſſeiſor all actions reals, and the diſſeiſor maketh a Feoffment in fee, and an Aſſize is brought againſt them, the Feoffee ſhall not plead the releaſe to the diſſeiſor, for that he is not privy to the Releaſe, for a releaſe of actions ſhall only extend to privies.

If the diſſeiſee releaſe all Actions to the diſſeiſor, and die, this doth bar him but for his life. So note a diverſity between a releaſe of right, and a releaſe of Actions, 19 *H.6.23.a.*

Sect.496. Fol.286.a.

If the diſſeiſee releaſe all actions to the heir of the diſſeiſor which is in by diſcent, he hath no remedy to recover the land; but yet the diſſeiſee hath a right, for that he hath releaſed his actions and not his right.

If the heir of the diſſeiſor make a Feoffment in fee to two

and

and the diſſeiſe releaſe to one of the Feoffees all actions, the ſurvivor ſhall not plead this Releaſe.

Note, when a man hath ſeveral remedies for one and the ſelf-ſame thing, be it real, perſonal or mixt, albeit he releaſe one of his remedies, he may uſe the other. 19 *Aſſ.* 3. 30 *E.*3. 19.6.21 *H.*7.23.

*Sect.*498. *Fol* 286.*b.*

If the Plaintiff in an action of Detinue of Charters which concern the inheritance of his land, can declare of one Charter in eſpecial; the Defendant ſhall not wage his Law. 41*E.*3.2. 8*H.* 6.18.28,29.10*H*6.20.21*H.*6.1. 14*H.*6.4. 14*H*4.23,24, 27.

An Action of Detinue for Charters doth ſound in the realty, for therein Summons and Severance lieth; and in Detinue of goods a *Capias* doth lie, but for Charters in ſpecial a *Capias* lieth not, and yet a releaſe of actions perſonals in a Writ of detinue of Charters, is a good bar. 20 *H.*6.45. 19 *E.*3. *Severance* 14.

*Sect.*499. *Fol.*287.*a.*

In a Writ of Dower the Tenant pleaded that before the Writ purchaſed *A.* was ſeiſed of the Land, &c. until by the Tenant himſelf he was diſſeiſed, and that hanging the Writ *A.* recovered againſt him, &c. Judgment of the Writ, and adjudged a good plea; in which plea, the Tenant confeſſed a diſſeiſin in himſelf. 15*E.*4.4.*b.*

*Sect.*500. *Fol.*287.*b.*

Placitorum criminalium alia majora, alia minora, alia maxima, ſecundum criminum quantitatem; ſunt enim crimina majora & dicuntur capitalia, eò quod ultimum inducunt ſupplicium, &c. Minora verò quæ fuſtigationem inducunt, vel pœnam pilloralem, vel tumboralem, vel carceris incluſionem, &c. Bract. lib. 3. 101. b.

Criminalium quædam ſententialiter mortem inducunt, quædam verò minime. Fleta lib. 1. c. 15.

Appellum ſignifieth *Accuſatio*; and the Appellant, Accuſa-

tor

tor is peculiarly in legal ſignification applied to Appeals of three ſorts:

1. Of wrong to his Anceſtor, whoſe heir male he is, and that is only of death, whereof our Author here ſpeaketh.

The 2. is of wrong to the husband, and is by the wife only of the death of her husband to be proſecuted.

The 3. is of wrongs done to the Appellants themſelves, as Robbery, Rape, and Mayhm. The word *Appellum* is derived of *Appeller*, to Call, becauſe *Appellans vocat reum in judicium.* Glanv. l. 7. c. 9. *æſtimatio capitis*, (i.e.) ſo much as one paid for the killing of a man. *Fleta lib. 1. cap. 42. Hoved. fol.* 344.

You ſhall not read of any Inſurrection or Rebellion before the Conqueſt, when the view of Frankpledge and other ancient Laws of this Realm were in their right uſe.

A releaſe of all actions real and perſonal cannot bar an Appeal of Death, becauſe that releaſe extendeth to common or civil actions, and not to actions criminal, 21 *H.* 6. 16.

Roberia, is a felonious taking away of goods *de la Robe*, that is, from the perſon, 22 *Aſſ.* 39. *W.* 1. *c.* 20.

Sect. 502. *Fo.* 208. *a.*

En appeal de Mayhem un releaſe de touts maners actions perſonals eſt bone plea, &c. for that every action wherein damages only are recovered by the Plaintiff, is in Law taken for an action perſonal. 21 *H.* 6. 16.

Sect. 503. *Fol.* 288. *b.*

Before that time that the Outlawry appear of Record, the Defendant doth not forfeit his goods, nor the Plaintiff can be diſabled, nor any Writ of Error doth lie in that caſe. 28 *Aſſ.* 49, 12 *E.* 3. *Utlage* 3. *M.* 4 *&* 5 *Eliz. Dyer* 222. *S.* 197.

If a man by proceſs upon the Original be Outlawed, there he ſhall be reſtored to nothing in the perſonalty againſt the Plaintiff. But where by the Outlawry he forfeited all his goods and chattels to the King, he ſhall be reſtored to them;

them; alſo thereby he ſhall be reſtored to the Law, and to be of ability to ſue &c. but if the Plaintiff in a perſonal action recover any debt, &c. or damages, and the Defendant be outlawed after Judgment, there in a Writ of Error brought by the Defendant upon the principal Judgment, a releaſe of all actions perſonals is a good plea. And ſo it is where a Judgment is given in a real action, a releaſe of all actions reals is a good bar in a Writ of Error thereupon.

And in this ſpecial caſe here put by *Littleton*, wherein the Plaintiff is to recover, or to be reſtored to nothing againſt the party; yet for that the Plaintiff in the former action is privy to the Record, a releaſe of a Writ of Error to him is ſufficient to bar the Plaintiff in the Writ of Error of the Suit, and vexation by the Writ of Error. And ſo note, that an action real or perſonal doth imply a recovery of ſomething in the realty, or perſonalty, or a reſtitution to the ſame, but a Writ implieth neither of them, 1 *H.*4.6.13 *E.*4.1,2.26 *H.*8.3.*b.*29 *Aſſ.*35.47 *E.*3.6.35 *H.*6.19.

*Sect.*504. *fol.*289.*a.& b.*

A releaſe of all actions reg. is no bar of execution, for the execution doth begin when the action doth end. And therefore the foundation of the firſt is an original Writ, and doth determine by the Judgment; and the Writs of Execution are called Writs Judicial, becauſe they are grounded upon the Judgment, 13 *H.*4.*Rel.*5 3.19 *H.*6.3. Where a *Capias ad Sat.* lieth at the Common Law, and where it is given by Statute, *vide* Sir *William Herberts* Caſe, *lib.*3.*fo.*11,12.

Maxims in the Law concerning Executions, *Ea quæ in Curia noſtra rite acta ſunt, debitæ executioni demandari debent; parum eſt latam eſſe ſententiam niſi mandetur executioni. Executio juris non habent injuriam. Executio eſt fructus & finis legis. Juris effectus in executione conſiſtit. Proſecutio legis eſt gravis vexatio, executio legis coronat opus. Boni judicis eſt judicium ſine dilatione mandare executioni. Favorabiliores ſunt executiones aliis proceſſibus quibuſcunque.*

When *Littleton* wrote, by force of certain Acts of Parliament,

ment, execution might be had of lands (beſides by force of the Elegit) upon Statute Merchant, Statute Staple, and Recognizances taken in ſome Court of Record, and ſince he wrote upon a Recognizance or Bond taken by force of the Statute 23 *H.* 8. before one of the Chief Juſtices, or the Mayor of the Staple, and the Recorder of *London* out of Term, which hath the effect of a Statute Staple, 11 *E.*1. *Stat. de Acton Burnel*, 13 *E.*1. *de Mercat.* 27 *E.*3. *c.*22. 23 *H.*8. *cap.*6. 25 *E.*3.53. *& vide* 32 *H.*8. *c.*5. a profitable Statute, concerning executions of Lands, Tenements, &c. *Sed opus eſt enterprete. Vide fo.*289. *& lib.fo.*66. *Fulwoods* Caſe.

If a man have a Judgment given againſt him for debt or damage, or be bound in a Recognizance, and dieth, his heir within age, or having two daughters, and the one within age, no execution ſhall be ſued of the lands by Elegit during the minority, albeit the heir is not ſpecially bound, but charged as Terre-Tenant, 15 *E.* 3. *Age* 95. 24 *E.*3. 28. 29 *Aſſ.*37. 29 *E.*3.50. 47 *Aſſ.*4. 47 *E.*3.7. *lib.*3. *f.*13. *Brook Age* 33.

And ſo againſt an heir within age no execution ſhall be ſued upon a Statute Merchant or Staple, nor upon the obligation or recognizance upon the Statute 23 *H.*8. for it is excepted in the proceſs againſt the heir. Neither if the heir within age endow his mother ſhall execution be ſued againſt her during his minority. *Temps E.*1.402.417. *fo.*290. *a.*

Vide le ſtatute 13 *Eliz. cap.*5, made againſt fraudulent Feoffments, gifts, grants, &c. Judgments and Executions, as well of lands and tenements, as of goods and chattels, to delay, hinder or defraud Creditors, and others of their juſt and lawful Actions, Suits, Debts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Releaſes. *Sed opus eſt, &c. lib.*3. *fo.* 80. *&c. Troyns* Caſe, *l.*5. *f.*67. *Gooches* Caſe, *l.*6. *f.*18. *Pakemans* Caſe, *l.*10. *f.*56. the Chancellor of *Oxfords* Caſe. See the Statute of 3 *H.*7. *c.*4. *&* 50 *E.*3. *c.*6. *M.*12 *&* 13 *Eliz. Dyer* 295. 18 *Eliz.*451. *Dyer.*

Elegit is a Judicial Writ, and is given by the Statute, either upon a recovery for debt or damages, or upon a Recognizance

zance in any Court: The words of the Writ be *Elegit ſibi liberari, &c.* By this Writ the Sheriff ſhall deliver to the Plaintiff *Omnia catalla debitoris (exceptis bobus & aſris Carucæ) & medietatem terræ.* And this muſt be done by an Enqueſt to be taken by the Sheriff. *W.2.c.18.*

Fieri fac' is a Writ mentioned in the ſaid Statute but it is a Writ of Execution at the Common Law, and is called a *Fieri fac'*, becauſe the words of the Writ directed to the Sheriff be, *quod fieri fac' de bonis & catallis, &c.*

But note, that a *Capias ad ſatisfac'* is not mentioned in the ſaid Statute, becauſe no *Capias ad ſatisfac'* did lie at the Common Law upon a Judgment for debt, &c. or damages, but only when the original action was, *Qu. vi & armis &c.* but later Statutes have given a *Capias ad ſatisfac'* where debt, &c. or damages are recovered. *Lib.3.fo.11.* Sir *William Herberts* Caſe.

And note, that theſe three Writs of Execution ought to be ſued out within the year and a day after Judgment; but if the Plaintiff ſueth out any of them withing the year, he may continue the ſame after the year, until he hath execution.

And to none of theſe Writs of Executions the Defendant can plead; but if he hath any matter ſince the Judgment to diſcharge him of Execution (as a releaſe of all Executions, &c.) he may have an *Audita querela*, and relieve himſelf that way.

Sect.505. Fo.290.b.

Scire fac' is a Judicial Writ, and properly lieth after the year and day after Judgment given. But becauſe the Defendant may thereupon plead, this *Scire fac'* is accounted in Law to be in nature of an action, and therefore a releaſe of all actions is a good bar of the ſame, and ſo is a releaſe of Executions &c. *19H.6.3.(4.) 18E.4.7.*

This Writ was given in this caſe by the Statute of *W.2. c.45.* for at the Common Law, if the Plaintiff had ſurceaſed to ſue execution by *fiere fac'* or *levari fac'* a year and a day he

he had been driven to his new Original, 8*E.*3.297,298. 18 *E.*3.33.*l.*3.12.

Note, that every Writ whereunto the Defendant may plead, be it Original or Judicial, is in Law an action.

*Sect.*507. *Fol.*291.*a.*

Note a diverſity between a releaſe of all actions, and a releaſe of all ſuits. If a man releaſe all ſuits, all execution is gone, for no man can have execution without prayer and ſuit, but the King only. 26*H.*6.*Exec.*4. *l.*8. *f.*153.*Ed. Althams* caſe, *Brook* tit. *Rel.*87.

So if the body of a man be taken in execution, and the Plaintiff releaſe all actions, yet ſhall he remain in execution, but if he releaſe all debts or duties it is otherwiſe, 26*H.*6.*Exec.*7.

If *A.* be accountable to *B.* and *B.* releaſe him all his duties, this is no bar in an action of Account, for what ſhall fall out upon the account is incertain, but duties do extend to all things due that is certain, and therefore diſchargeth Judgments in perſonal actions and executions alſo, 20 *H.*6. *per Paſton.*

*Sect.*508,509,510,511. *Fo.*291.*b.*292.*a.*

There be two kinds of Demands or Claims. *Pl. Com. Stiles* Caſe, 359, *&c.*

1. Expreſs or in deed, as in all real Actions.
2. Implied or in Law; as 1. In all actions perſonal. In actions of Appeals. 3. Of Execution. 4. Of title or right of Entry either by force of a condition or by any former Right 5. Of a Rent-ſervice, Rent-charge, Common of Paſture, &c. *verte fol.*

All which *Littleton* here and in the two next Sections following, putteth but for example; for by the releaſe of all Demands, other things alſo be releaſed, as Rents-ſeck, all mixt actions, a Warranty which is a Covenant real, and all other Covenants real and perſonal, Eſtovers, all manner of Commons, and profit apprender, Conditions before they be

on

broken or performed, or after, Annuities, Recognizance, Statute Merchant, or of the Staple, Obligations, Contracts, &c. are releaſed and diſcharged, 38*H.*8.*tit.Releaſe, Br.*9.6*H.*7.7.15. 20 *Aſſ.p.*5.40*E.*3.22.49*E.*3.7.*b.* 50*Aſſ.p.*6. 13*R.*2.*Avow.*89. *Althams* Caſe,*ante Lit.Sect.*748.*Dy.*5*Eliz.*217.

Querela à querendo; this properly concerneth perſonal actions or mixt at the higheſt, for the Plaintiff in them is called *querens.* And yet by a releaſe of all quarrels, all actions real and perſonal are releaſed; likewiſe all cauſes of action are releaſed thereby, albeit no action be then depending for the ſame. 39*H.*6,9.

*Sect.*512,513.*fol.*292.*b.*

A ſum of Money to be paid at a day to come, is *debitum in præſenti, quamvis ſit ſolvendum in futuro.* 11*H.*4.41.43.

An Executor before probate, may releaſe an action, and yet before probate he can have no action, becauſe the right of the action is in him. *T.*2 *Ja.in C.B. inter Middleton & Rinnot.*18*H.*6.23.*b.Pl.Com.*277,278.*Greysbrokes* Caſe *per Weſton.*

If a man make a leaſe of land to another for years, rendring to him at *Mich.* 40 ſhillings, and after before the day of payment, he releaſe to the leſſee all actions, this is a void releaſe. 7*H.*7.5.*a.*

But the leſſor before the day may acquit or releaſe the rent. But if a man be bound in a Bond, or by contract to another to pay one 100 pound, &c. at five ſeveral days, he ſhall not have an action of Debt before the laſt day be paſt, and ſo note a diverſity between duties which touch the realty, and meer perſonalty. But if a man be bound in Recognizance to pay 100 pound, &c. preſently after the firſt day of payment he ſhall have execution upon the Recognizance for that ſum, &c. for that is in the nature of ſeveral Judgments; and ſo it is of a Covenant or Promiſe, &c. and ſo note the diverſities. 45*E.*3.8.13*H.*4.*Avow.*240. 30*E.*3.13. 10*E.*2.*Execution* 137. *F.N.B.*267.9*E* 3.7.5*Mar.Action ſur le Caſe, Br.*108. 3*Mar.Dy.* 113.*lib.*4 *fo.*94.*Slades* Caſe, *lib.*5.*fo.*81.*b.Fords* Caſe.

If

If a man hath an annuity for term of years, or for life, or in fee, and he before it be behind doth releaſe all actions, this ſhall not releaſe the annuity, for it is not meerly in action becauſe it may be granted over. 39*H.*6.28.*b.*5*E.*4.45. 2*H.*4.13. 12*R.*2.*Releaſe* 29.

Sect. 514. *Fo.* 293, *&c.*

Miſe, ſo called becauſe both parties have put themſelves upon the meer right to be tried by grand Aſſ. or by Battail, ſo as that which in all other actions is called an iſſue, in a writ of Right in that caſe is called a Miſe. But in a writ of Right, if a collateral point is to be tried, there it is called an iſſue. 33*H.*8.*c.*13.3*Ed.*6.*ca.*36.

And ſeeing the Miſe is joyned upon the meer right, albeit the Verdict of the grand Aſſ. be given upon another point, yet Judgment final ſhall be given; and ſo it is if the Tenant after the Miſe joyned make default, or confeſs the action, or if the demandant be non-ſuit, &c. 34*E.*3.*Judgment* 250. 13*H.*4. *Judgment* 245. *M.Dy.*98.*li.*5. *fo.*85. *Penerins* Caſe, *F.N.B.*5. 11.13.

If the petit Jury be attainted of a falſe Oath, &c. The judgment of the Common Law is,

1. *Quod amittat liberam legem imperpetuum, i.e.* he ſhall never be received to be a witneſs, or of any Jury.

2. *Quod forisfaciat omnia bona & catalla ſua.*

3. *Quod terræ & tenementa in manus dom. Reg. capiantur.*

4. *Quod uxores & liberi extra domus ſuas ejicerentur.*

5. *Quod domus ſuæ proſtrentur.*

6. *Quod arbores ſuæ extirpentur.* 7. *Quod prata ſua arentur.* Et 8. *Quod corpora ſua carceri mancipentur.* So odious in this caſe, and the ſeverity of this puniſhment is to this end, *ut pœna ad paucos, metus ad omnes perveniat,* for there is *miſericordia puniens,* and there's *crudelitas parcens.*

In no caſe where a contempt, treſpaſs, deceit or injury is ſuppoſed in the defendant he ſhall wage his Law, becauſe the Law will not truſt him with an Oath to diſcharge himſelf in thoſe caſes, only in ſome caſes, in debt, detinue, accompt, the

defendant is allowed by Law, to wage his Law. 44 *E.*3.32. 18*E.*3 4.24*E.*3.39.

In an action of Account againſt a Receivor upon a receipt of mony, by the hand of another, &c. the defendant ſhall not wage his Law, becauſe the Receipt is the ground of the action which lieth not in privity between the Plaintiff and Defendant, but in the notice of a third perſon, and ſuch a Receipt is traverſable. 15*E.*4.16. 10*E.*4.5. But in an action of Debt upon an arbitrement, or in an action of Detinue by the bailment of another hand, the Defendant ſhall wage his Law, becauſe the debt and detinet is the ground of thoſe actions, and the contract of bailment, though it be by another hand, is but the conveyance, and not traverſable. In an action of Account againſt the Bayliff of a Manor, the defendant cannot wage his Law, becauſe it ſoundeth in the realty, 33 *H.*6. 24.13*H.*7.3.*a.*1*H.*6.1.*b.*11*H.*4.54. 5*H.*5.13. 9*E.*4.1. 34*H.*8. *ley gager Br.*97.

In an action of Debt brought by an Attorney for his fees, the Defendant ſhall not wage his Law, becauſe he is compellable to be his Attorney. 21*H.*6.4.10*H.*6.7.28*H.*6.4.38*H.*6.6.

Whenſoever a man is charged as Executor or Adminiſtrator, he ſhall not wage his Law, for no man ſhall wage his Law of another mans deed but in caſe of a ſucceſſor of an Abbot, for that the houſe never dieth. 5*H.*6.38.1*H.*7.25.

CHAP.

CHAP. IX.

Of Confirmation.

Sect. 515.

Confirmatio omnes ſupplet defectus, licet id quod actum eſt ab initio, non valuit. Bract.l 2.58.

A Confirmation is a conveyance of an eſtate or right in *eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is increaſed.

Confirmatio eſt nulla ubi donum præcedens eſt invalidum, & ubi donatio nulla omnino nec valebit confirmatio. Bract.l.2. fo.27,28.

Non valet confirmatio niſi ille qui confirmat, ſit in poſſeſſione rei, vel juris unde fieri debet confirm' & eodem modo niſi ille cui confirm' ſit, ſit in poſſeſſione. 10 E.2. Confirm. 14. 32 E.3.9 Pl Com. Count de *Leiceſters* caſe.

Quælibet Confirmatio, aut eſt perficiens, creſcens, aut diminuens. Lib 9.fo.142. *Beaumonds* caſe.

Carta autem de confirmatione eſt illa quæ alterius factum conſolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit. Flet.l.3.ca.14.

En aſc' caſe un fait de confirmation eſt bon & available, lou en tiel caſe un fait de releaſe neſt pas bon &c. Car releaſe neſt pas available, mes lou eſt un privity, &c.

And note that where a Confirmation ſhall enlarge an eſtate there privity is required, as well as in the caſe of the Releaſe 9H.6.22. *Releaſe* 44. *Littleton* in this Chapter putteth eight diverſities between a Confirmation and Releaſe. And in this Chapter is alſo to be obſerved eight caſes, wherein a Releaſe and Confirmation have the like operation in Law. *Vide Sect.* 516, *&c. fo.*296.*a.*

If the diſſeiſor make a Leaſe for years, to begin at *Michaelmas*; and the diſſeiſee confirm his eſtate, this is void,

becauſe he hath but *intereſſe termini*, and no eſtate in him, whereupon a confirmation may enure. 4*H.* 7. 10. by *Read.* 22*E.* 4. 39.

Sect. 519, *&c. fol.* 296. *b.*

Si le diſſeiſee confirme leſtate le diſſeiſor a aver & tener a luy pur terme de ſa vie, enc' le diſſeiſor ad fee-ſimple, &c. pur ceo que quant ſon eſtate fuit confirme, donque il avoit fee, & tiel fait ne poit change ſon eſtate ſans entre fait ſur luy, &c. Alia ratio, quia confirmare, idem eſt quod firmum facere. 19*H.* 6. 22. 6*E.* 3. *Confirmation* 4.

Sect. 520. *Fol.* 297. *a.*

Nota, A diverſity between a bare aſſent without any right or intereſt, and an aſſent coupled with a right or intereſt, and therefore an attornment cannot be made for a time, nor upon condition; but if a Parſon make a Leaſe for an 100 years, the Patron and Ordinary may confirm 50 of the years, for they have an intereſt, and may charge in time of vacation. *Lib.* 5. *fo.* 81. *Fords* Caſe.

If tenant for life make a leaſe for an 100 years, the leſſor may confirm either for part of the term, or for part of the land. But an eſtate of freehold cannot be confirmed for part of the eſtate, for that the eſtate is intire, and not ſeveral as years be.

Sect. 521. *fo.* 207. *b.*

If the diſſeiſor make a gift in tail, the remainder for life the remainder to the right heirs of tenant in tail, this extendeth only to the eſtate tail, &c. If the diſſeiſor infeoff *A.* and *B.* and the heirs of *B.* if the diſſeiſee confirm the eſtate of *B.* for his life, this ſhall not only extend to his companion, but to his whole fee-ſimple, becauſe to many purpoſes he had the whole fee-ſimple in him, and the confirmation ſhall be taken moſt ſtrong againſt him that made it.

If a feme diſſeiſereſs make a feoffment in fee to the uſe of *A.* for life, and after to the uſe of her ſelf in tail, and the remainder to the uſe of *B* in fee, and then taketh husband the

the diſſeiſee, and he releaſe to A. all his right, this ſhall enure to B. and to his own wife alſo, for by the rule of *Littleton*, it muſt enure to all in the remainder.

But A. lets Land to B. for life, and B. maketh a Leaſe to C. for his life, the remainder to A. in fee, if A. releaſe to C. all his right, this is good to perfect the eſtate of C. for his life.

But when C. dieth, A. ſhall be in of his old eſtate, &c. and note that in theſe two caſes, the fee is deveſted, and veſted all at one inſtant, &c. *Vide fo.* 297. b.

Pur ceo le remainder eſt dependant, &c. by this ſome have gathered, that if a diſſeiſor make a Leaſe for life, reſerving the reverſion to himſelf, and the diſſeiſee, confirm the eſtate of the diſſeiſor, that he may enter upon the leſſee, becauſe the eſtate of him in the reverſion dependeth not upon the eſtate for life as the remainder, but all his one, for by the confirmation made to him in the reverſion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder: and he cannot by his entry avoid the eſtate of the leſſee for life, but he muſt avoid the eſtate of the leſſor, which againſt his own confirmation he cannot do; and it hath been adjudged, that if a diſſeiſor make a Leaſe for life, and after levy a fine of the reverſion with proclamations, and the five years paſſe, ſo as the diſſeiſee is for the reverſion barred, he ſhall not enter upon the Leſſee for life. Reported by Sir *Jo. Popham* chief Juſtice.

Where the particular eſtate and the remainder depend upon one title, there the defeating of the particular eſtate is a defeating of the remainder. But where the particular eſtate is defeaſible, and the remainder by good title, there though the particular eſtate be defeated, the remainder is good. As if the Ieſſor diſſeiſe A. leſſee for life, and make a Leaſe to B. for the life of A. the remainder to C. in fee, albeit A. reenter, and defeat the eſtate for life, yet the remainder to C. being once veſted by good title, ſhall not be avoided, for it were againſt reaſon, that the leſſor ſhould have the remainder again againſt his own livery. So it is if

a leaſe be made to an Infant for life, the remainder in fee, the Infant at his full age diſagree to the eſtate for life yet the remainder is good, *Pl.Com. Colthirſts* Caſe, *fo.* 298. a.

If a leaſe be made to A. for life of *B.* the remainder to C. in fee, A. dieth before an Occupant enter, here is a remainder without a particular eſtate, and yet the remainder continueth, 17 *E.*3.48.

A rent is granted to the Tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular eſtate continued, not for *eo inſtante*, that he took the particular eſtate, *eo inſtante*, the remainder veſted, and the ſuſpenſion in Judgment of Law grew after the taking of the particular eſtate, 3 *E.*3. *Abb. Aſſ.*

If a man grant a rent to B. for the life of *Alice*, the remainder to the heirs of the body of *Alice*, this is a good remainder; and yet it muſt veſt upon an inſtant, 7. *H.* 4. 6.

*Sect.*522,523,524. *Fol.*298.2.

A Releaſe is more forcible in Law, then a Confirmation: If the diſſeiſee and a ſtranger diſſeiſe the heir of the diſſeiſor, and the diſſeiſee confirm the eſtate of his companion, this ſhall not extinguiſh his right that was ſuſpended: So as if the heir of the diſſeiſor re enter, the right of the diſſeiſee is revived.

And ſo it is if the grantee of a rent charge, and a ſtranger diſſeiſe the Tenant of the Land, and the grantee confirm the eſtate of his companion, the Tenant of the land reenter, the rent is revived, for the Confirmation extendeth not to the rent ſuſpended, otherwiſe it is of a releaſe in both caſes.

Eſt bon & ſure choſe en cheſe' confirmation d'aver ceux parols a aver & tener les tenements, &c. *en fee, ou en fee tail, ou pur terme de vie, ou pur terme dans ſolonque eo que le caſe eſt*, &c.

Note the diverſity between a Confirmation of the eſtate for life in the land, to have and to hold the ſaid eſtate in the land to him and his heirs, this cannot enlarge his eſtate, for his

his eſtate being but for life, cannot be extended to his heirs. But in that caſe if he confirm the eſtate for life in the land in the premiſes of the Deed, and the *habendum* is to have and to hold the land to him and his heirs, this ſhall create in him a feeſimple, 18 *E.*3.40.

Sect. 525.

If a man letteth land to the husband and wife, to have and to hold, the one moity to the husband for terme of his life, and the other moity to the wife for her life, and the leſſor confirm the eſtate of them both in the land, to have and to hold to them and to their heirs; by his Confirmation, as to the moity of the husband, it enureth only to the huſband and his heirs, for the wife had nothing in that moity, but as to the moity of the wife they are joyntenants, for the husband hath ſuch an eſtate in his wifes moity in her right, as is capable of a Confirmation. But if ſuch a leaſe for life be made to two men by ſeveral moitys, and the leſſor confirm their eſtates in the land to have and to hold to them and to their heirs, they are Tenants in Common of the Inheritance; for reg. the Confirmation ſhall enure according to the quality and nature of the eſtate which it doth enlarge and encreaſe, 18 *Aſſ.* p. 3. 18 *E.* 3. *Confirmation* 17. *fol.* 299. b.

If a leaſe for life be made to A. the remainder to B. for life, and the leſſor confirm, &c. A. taketh one moity to him and his heirs, and therefore of the one moity he is ſeiſed for life, the remainder to B. for life, and then to him and his heirs: of the other moity A. is ſeiſed for life, the immediate inheritance to B. and his heirs, becauſe as to the moity which B. takes, the ſame is executed, 39 *H.*6.9.

If lands be given to two men, and to the heirs of their two bodies begotten, and the Donor confirm their two eſtates in the land, to have and to hold the land to them two and to their heirs; in this caſe ſome are of opinion, that they ſhall be joyntenants of the fee ſimple, becauſe the Donees were jointenants for life, and the Confirmation muſt enure according

according to the eſtate which they have in poſſeſſion, and that was joynt. But others hold the contrary: For

1. They ſay, that the Donees have to ſome purpoſes ſeveral inheritances executed, though between Donees ſurvivor ſl all hold for their lives.

2. They ſay that when the whole eſtate which comprehended ſeveral inheritances is confirmed, the Confirmation muſt enure according to the ſeveral inheritances, which is the greater and moſt perdurable eſtate, and therefore that the Donees ſhall be Tenants in Common of the inheritance in this caſe.

Albeit in this caſe of *Littleton*, the Husband by the Confirmation gaineth an eſtate for life in remainder, yet if the husband doth waſte, an action of Waſte ſhall lie againſt him and his wife, notwithſtanding the mean remainder, becauſe the husband himſelf committeth the waſte and doth the wrong, 17 *E.*3. 68.*b.* Sir. *Edward Caries* Caſe, *lib.* 5. *fo.* 76.*b.*

Sect. 526, 527. *Fol.* 300.*a.*

Note a diverſity between a leaſe for life and a leaſe for years made to a feme covert: for her eſtate of Freehold cannot be altered by the confirmation made to her husband and her, as the term for years may, whereof her husband may make diſpoſition at his pleaſure.

Chattels reals, as leaſes for years, Wardſhips, &c. are not given to the husband abſolutely (as all Chattels perſonals are) by the intermarriage, but conditionally, if the husband happen to ſurvive her, and he hath power to alien them at his pleaſure: but in the mean time the husband is poſſeſſed of the Chattels real in her right, 5*E.*3. 17.*b.Pl. Com.*418 *b.*24 *H.*4.12.*Pl.Com.* Dame *Hales* Caſe, 50 *Aſſiſ.* 15.4*H.*6. 5.7 *H.*6.1.21 *H.*7.29,21 *E.*4.40. 26 *H.*8.7.

Such a thing as I may defeat by my Entry, I may make good by my Confirmation, 11 *H.*7.28.3 *H.*4. 10.

If the feoffee upon condition grant a rent charge *in fee*, and the feoffor confirm it, and after the Condition is bro-

ken

ken, and the feoffor enter, he ſhall not avoid the rent charge. And ſo it is if the heir of the diſſeiſor grant a rent charge, and the diſſeiſee confirmeth it, and after recover the Land, he ſhall not avoid the rent. And yet in neither of theſe caſes his entry was congeable at the time of the Confirmation, *Lib.* 1. *fo.* 147, *&c. Anne Mayowes* caſe.

Sect. 528. *Fol.* 300. *b.*

Perſona, is ſaid to be ſeiſed in *jure Eccleſiæ*, and the Law hath an excellent end herein, *viz.* that in his perſon the Church might ſue for and defend her right, and alſo be ſued by any that had an elder and better right; and when the Church is full, it is ſaid to be *plena* & *conſulta* of ſuch a one Parſon thereof, that may *vicem ſeu perſonam gerere ejuſdem Eccleſiæ*, Brit. fol. 234. b. *F. N.* 48.

A. Parſon of D. is Patron of the Church of S. as belonging to his Church, and preſents B. who by conſent of A. and of the Ordinary, grant a rent charge out of the Gleab; this is not good to make the rent charge perpetual, without the aſſent of the Patron of A. no more than the aſſent of the Biſhop who is Patron, without the Dean or Chapter; or no more than the aſſent of the Patron being Tenant in Tail or for life, as *Littleton* ſaith. And *Littleton* here ſaith, that the Patron that confirms muſt have a fee ſimple, meaning to make the charge perpetual. And *Littleton* after ſaith, that in the caſe of the Parſon the fee is in abeiance; and ſeeing the conſent of the Patron is in reſpect of his intereſt as heir, it appeareth by *Littleton* he may conſent upon Condition, otherwiſe it is of an attorment, becauſe it is a bare aſſent, Alſo if the ſtate of the Patron be conditional, and he confirmeth, and after the Condition is broken, his Confirmation is void, *Lib.* 2. 39 & 24 *l.* 1. 153 *l.* 4. 23, 24 *l.* 5. 31. 81 *l.* 10. 6. *l.* 11. 19 *l.* 6. 34.

Note to a diverſity between a ſole Corporation, as Parſon, Prebend, Vicar, &c. that have not the abſolute fee in them, for to their grants, the Patron muſt give his conſent. But if there be a Corporation aggregate of many, as Dean and Chapter

Chapter, *Mr.* Fellows and Scholars of a Colledge, Abbot or Prior, and Covent, &c. or any ſole Corporation that hath the abſolute fee, as a Biſhop with conſent of the Dean and Chapter, they may by the Common Law make any grant of, or out of their poſſeſſions, without their founder or patron, albeit the Abbot or Prior, &c. were preſentable: and ſo it is of a Biſhop, Becauſe the whole eſtate and right of the Land was in them, and they may reſpectively maintain a writ of right. 12 *H.*4. 11. 19 *E.* 3.7.7.*Eliz.Dy.*238.9.*E.*4.5. 2 *H.*4.11.

And note a diverſity between a confirmation of an eſtate, and a confirmation of a deed; for if the diſſeiſor make a charter of feoffment to *A.* with a Letter of Attorney and before livery, the diſſeiſee confirm the eſtate of *A.* or the Deed made to *A.* this is clearly void, though livery be made after. But if a Biſhop had made a Charter, &c. and the Dean and Chapter before livery confirm the Deed, this is a good confirmation, and livery made afterwards is good. The like Law is of confirmation of a Deed; of grant, of a reverſion before Attornment.

Grants made by Parſons, Prebends, Dean and Chapter, &c. are reſtrained by divers Acts of Parliament, 13 *El.ca.*10.1 *Eliz. ca.*18.18 *El.ca.*11. 1 *Ja.ca.*3. *Sect.*593. *&* 648.*l.*2.*fo.*46.*l.*4.76. *&* 120.*l.*5.9.6.14.*l.*6.17.*l.*7.8.*lib.*11.5.7. *deſeſſus ſum, &c.*

*Sect.*529, *&* *Sect.*531. *fol.*301. *a.& b.*

Note a diverſity, where the determination of the rent is expreſſed in the Deed, and when it is implyed in Law. For when Tenant for life grant a rent in fee, this by Law is determined by his death, and yet a confirmation of the grant by him in reverſion, makes that grant good for ever, without words of inlargement, or clauſe of diſtreſs, which would amount to a new grant; and yet if the Tenant for life had granted a rent to another and his heirs by expreſs words, during the life of the grantor, and the leſſor had confirmed that grant, it ſhould determine by the death of Tenant for life, 26 *Aſſ.p.*38.45 *Aſſ. p.*13.14 *Aſſ.p.*14.

Dedi

Dedi or *conceſſi* may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender, &c. and it is in the election of the party, to uſe it to which of theſe purpoſes he will, *Brit. l. 2. f. 59. b. Brook tit. confirm'* 20. 14 *H.* 7. 2. 37 *H.* 6. 17. *Dy.* 8 *Eliz.* 4 *H.* 7. 10. 22 *E.* 4. 36. 40 *E.* 3 41.

But a releaſe, confirmation, or ſurrender, &c. cannot amount to a grant, &c. nor a ſurrender, to a confirmation, or to a releaſe, &c. becauſe theſe be proper and peculiar manner of conveyances &c.

Dimiſi (and this verb, *volo*) will amount to a Confirmation, 7 *E.* 3. 9. In ancient Statutes, and in original Writs, as in the Writ of Entry *in caſu proviſo, in conſimili caſu ad com. legem, &c.* this word *dimiſi* is not applied only in a Leaſe for life, but to a gift in tail, and to a ſtate in fee. 32 *E.* 3. *Breve* 29. 1 *Stat. Glouc. ca.* 4. *Benignæ enim faciendæ ſunt interpretationes cartarum, propter ſimplicitatem laicorum, ut res magis valeat quam pereat*; and he to whom ſuch a Deed comprehending, *dedi, &c.* is made, may plead it as a grant, as a releaſe, or as a confirmation, at his Election, 14 *H.* 4. 36. *l.* 5. *fo.* 15. in *Newcomens* caſe.

If a diſſeiſor make a Leaſe for life, or a gift in tail, the remainder to the diſſeiſſee in fee, the diſſeiſee by his deed granteth over the remainder, the particular Tenant attorneth the diſſeiſee ſhall not enter upon the Tenant for life, or in tail, for then he ſhould avoid his grant demeſn, which amounted to a grant of the eſtate, and a confirmation alſo.

Sect. 543. *Fol.* 302. *b.*

If *Ceſtuy que uſe* and his feoffees after the Statute 1 *R.* 3. and before the Statute 27 *H.* 1. 8. *ca.* 10. had joyned in a feoffment it ſhall be the feoffment of the feoffees, becauſe the ſtate of the Land was in him. 21 *H.* 7. 34. *b. Pl. Com.* 59. *a. Wimbiſhes* caſe.

So it is if the Tenant for life, and he in the remainder, or reverſion in fee joyn in a feoffment by Deed, the livery of the freehold ſhall move from the leſſee, and the inheritance from

from him in the reverſion or remainder, from each of them according to his eſtate *Pl. Com. Brownings* caſe. 2 *H.*5.7 13 *H.*7.14.13 *E.*4.4.*a.* 27.*H.* 8.13 *M.*16. and 17 *El.*339.

But if he in the reverſion in fee and Tenant for life joyn in a feoffment *per paroll*, this ſhall be (as ſome hold) firſt a ſurrender of the eſtate of Tenant for life, and the Feoffment of him in the reverſion, for otherwiſe if the whole ſhould paſs from the leſſee, then he in the reverſion might enter for the forfeiture, and every mans act (*ut res magis valeat*) ſhall be conſtrued moſt ſtrongly againſt himſelf.

If the diſſeiſor and diſſeiſee joyn in a Charter of feoffment, and enter into the Land, and make livery, it ſhall be accounted the feoffment of the diſſeiſee, and the confirmation of the diſſeiſor.

*Placitum à placendo, quia omnibus placet.Fo.*303.*a.*

Ordine placitandi ſervato, ſervatur et jus, &c.1. In good order of pleading, a man muſt plead to the juriſdiction of the Court.2. To the perſon of the plaintiff, and to the defendant. 3. To the Count.. 4. To the Writ. 5. To the action, &c. *Bract. li. 5. fo.* 400.*Britton fo.* 41.*a.* and 122. 40. *E.*3.9.*b.*

The count muſt be agreeable and conform to the writ, the barr to the count, &c. and the judgment to the count.

Certa debet eſſe intentio et narratio, et certum fundamentum et certa res quæ deducitur in judicium. Note, three kind of certainties.1. To a Common intent, and that is ſufficient in a barre, which is to defend the party, and to excuſe him,

2. A certain intent in general, as in Counts, replications, and other pleadings of the Plaintiff, that is to convince the Defendant; and ſo in Indictments &c.

3. A certain intent in every particular, as in Eſtopples. *Bract.l.*2.*fo.*140.*lib.*5.120.&c.*Lobs* caſe.

Where a matter of Record is the foundation, or ground of the ſuit of the Plaintiff, or of the ſubſtance of the plea, there it ought to be certainly, and truly alledged, otherwiſe it is, where it is but a conveyance, *Pl.Com.*65.*a.* 6. 100.376 and 410.8.*Aſſ* 29.5 *E.*4.70 *E.*41. *Ambiguum placitum interpretari*

tari debet contra proferentem. 3 *H.*7 .3.29 *Aſs.* 10.14 *H.*4.4.b. *lib.*3.*fo.*59.*Linc.Coll.caſe.Vide*, &c. *fo* 303.*b.Expedit Reipublicæ ut ſit finis litium*, 22 *E.*4.40.

All neceſſary circumſtances implyed by Law, in the plea need not to be expreſſed, as in the plea of a feoffment of a Mannor, livery and attornement are implyed. 40 *E.*3.40.43. 46.14 *H.*4.15.12 *E.*4.1.7 *H.*7.3.

A man is bound to perform all the Covenants in an Indenture: if all the Covenants be in the affirmative, he may generally plead performance of all, but if any in the negative, to ſo many he muſt plead ſpecially (for a negative cannot be performed) and to the reſt generally. 2 *H.* 7. 15. 4 *H.* 7.12.26 *H.*8 5. *b.*

So if any be in the disjunctive, he muſt ſhew which of them hath performed. So if any are to be done of Record, he muſt ſhew that ſpecially, and cannot involve that in general pleading. *l.*8.133. *Turners* caſe, and 120 *Benhams* caſe *l.*9.25.61. *lib.* 10. 100.

The Count or declaration is an expoſition of the Writ, and addeth time, place, and other neceſſary circumſtances, that the ſame may be triable, and any imperfection in the Count doth abate the Writ. *Vide bone* matter concernant pleading. *Fo.* 303.

A departure in pleading, is ſaid to be when the ſecond plea containeth matter not purſuant to his former, and which fortifieth not the ſame. As if in Aſſ. the Tenant plead a diſcent from his Father, and giveth a colour, the demandant intituleth himſelfe by a feoffment from the Tenant himſelfe, the plaintiff cannot ſay, that the feoffment was upon condition, and to ſhew the condition broken, for that ſhould be a clear departure from his barre, becauſe it containeth matter ſubſequent, but in an Aſſ. if the Tenant plead in barre, that *I.S.* was ſeiſed and infeoffed him, &c, and the plaintiff ſheweth, that he himſelf was ſeiſed in fee, until *I.S.* diſſeiſed, who infeoffed the Tenant, and he re-entred, the defendant may plead a releaſe of the plaintiff to *I. S.* for this doth fortifie the barre, *Pl Com.* 105.1 *Mar Dy.*95 28. *H.* 8.*lib* 31.6 *H.*7.8.3 *H.*6.*departure* 2. Where

Where the Tenant or Defendant may plead a general iſſue, there upon the general iſſue pleaded, he may give in evidence as many diſtinct matters, to bar the action or right of the demandant or plaintiff, as he can.

A ſpecial Verdict may continue double or treble matter, and therefore in thoſe caſes, the Tenant or Defendant may either make choice of one matter, and ſo plead it to bar the demandant or plaintiff, or to plead the general iſſue, and to take advantage of all, or he may plead to part, one of the Pleas in bar, and to another part another plea, and his concluſion of his plea, ſhall avoid doubleneſs and hereby neither the Court, nor the Jury is ſo much inveigled, as if one plea ſhould contain divers diſtinct matters. And if the Tenant make choice of one plea in bar, and that be found againſt him, yet he may reſort to an action of an higher nature, and take advantage of any other matter. And the Law in this point, is by them that underſtand not the reaſon thereof, miſliked, ſaying, *Nemo prohibetur pluribus defenſionibus uti.* 17*E.* 3. 73. 39*H.*6. 27. *Apices juris, non ſunt jura*; and yet in Law, *præſtat cautela quam medela.*

Sect. 535, 536, 537, 538. *Fol.* 305. *a.*

A Tenure may be abridged by a confirmation: but not a rent-charge, or common. But a man may releaſe part of his rent-charge, or common, &c.

The Lord by his confirmation may diminiſh and abridge the ſervices, but to reſerve upon the confirmation new ſervices he cannot, ſo long as the former ſtate in the Tenancy continueth; and as where confirmation doth inlarge an eſtate in Land, there ought to be privity, ſo reg. where a confirmation doth abridge ſervices, there ought to be privity. 28*E.* 3. 92, 93. 26*Aſſ.* 37. 6*El. Dy.* 230. *b.* 7*E.* 4. 25. *a.* 21*E.* 4. 62. *per Brian.* 10*E.* 3. *Avowry* 100.

Alſo there is required privity, when the Lord by his releaſe, abridgeth the ſervices of his Tenant. And therefore the Lord paramount cannot releaſe to the Tenant paravail ſaving to him part of his ſervices, but the ſaving in that caſe is

is void, 4 *E.*3.19. 9 *E.*3.1. 12 *E.*4.11. 16 *E.*3. *Fines* 4.

If a man hold of me by Knights ſervice, rent, ſuit, &c. and I releaſe to him all my right in the Seigniory, excepting the Tenure by Knights ſervice, or confirm his eſtate to hold of me by Knights ſervice only, for all manner of Services, Exactions and Demands, yet ſhall the Lord have Ward, Marriage, Relief, Aid *pur file marier, & pur faire fits Chivaler*, for theſe be incidents to the Tenure that remain. But it is holden, That if a man make a gift in tail by Deed, reſerving 2 *s.* rent, *a luy & ſes heires pro omnibus & omnimodis ſervitiis, exactionibus ſecularibus & cunctis demandis*; If the Donee die, his heir of full age, the Donor ſhall have no relief; becauſe relief lieth in demand, 13 *R.*2. *Avowry* 29. *Nota Fitzh. Confirm. Pl.* 21.

Sect. 541. *Fo.* 306. *b.*

A man may be put out of poſſeſſion of the cuſtody of his Ward, but not of his Villain in groſs, 45 *E.*3.10. 1 *H.*6. *c.*5. *Reg.* 102.

Alſo of things that are in grant, as Rents, Commons, &c. it is at the election of the party, whether he will be diſſeiſed of them or no, *Brook* tit. *Property* 28.

Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei vel juris, unde fieri debet confirmatio, & eodem modo niſi ille cui confirmatio ſit, ſit in poſſeſſione, Bract. *l.*2. 59 *b.* 9 *E.*4.38. *Dyer* 10 *El.* Groweches *Caſe*.

But of a Villain Regardant to a Manor, the Lord may be put out of poſſeſſion, for by putting him out of poſſeſſion of the Manor, which is the principal, he may likewiſe be put out of poſſeſſion of the Villain regardant, which is but acceſſory: and by the recovery of the Manor, the Villain is recovered.

But if another doth take away my Villain in groſs or regardant, he gaineth no poſſeſſion of him.

By the grant of the Manor without ſaying *Cum pertinentiis*, the Villain regardant, Advowſon appendant, and the like, do paſs: for if the diſſeiſor ſhall gain them as incidents to the Manor

Manor whose estate is wrongful, *A multo fortiori*, the feoffee who cometh to his estate by lawful Conveyance, shall have them as incidents. But where the entry of the disseisee is lawful, he may seise the Villain Regardant, or present to the Advowson, &c. before he enter into the Manor, otherwise it is where his entry is not lawful. 9*E.*4.38. 3*H.*4.15. 18*E.*3.44. 19*R.*2.*Tresp.*255.10*H.*7.9.*F.N.B.*33.*q.*22*H.*6.33.*per Moyle.*43 *E.*3.12.*Bract.*242,*&c.Brit.fol.*126.

*Sect.*545,546,547,548,549,*&c. Fo.*308.

Si jeo lessa terra a un home pur terme d'ans, & puis jeo confirme son estate sans pluis parols mitter en le fait parcel il nad pluis greinder estate que pur terme d'ans, sicome il avoit a devant. Mes si jeo release a luy,&c. il ad estate de frankten'.

Si jeo esteant deins age lessa terre a un auter pur terme de 20 *ans, & puis il grant le terre a un auter* 10 *ans parcel de son term, en cest case,quant jeo sue de plein age si jeo release al grantee de mon lessee, &c. cest release est void, pur ceo que il luy ad asc' privity perenter luy & moy, &c. Mes si jeo confirm son estate ceo est bone. Mes si mon lessee grant tout son estate a un auter,donque mon release fait al grantee est bon & effectual.*

Si home grant un rent-charge issuant hors de son terre a un auter pur terme de son vie, & puis il confirma son estate en le dit rent,a aver,& tener a luy in fee-tail ou in fee-simple cest confirm' est void, quant a enlarge son estate, pur ceo que celuy que confirm n'avoit asc' reversion en le rent. Mes si home fait seisie in fee de rent-service, ou de rent-charge, & il grant le rent,&c.auterm' est, pur ceo que il avoit un reversion del rent.

So note the diversity between a rent newly created, and a rent *in esse*,21*E.*3.47.15*E.*4.8.*b.Pl.Com.*35.8*H.*4.19.

But in the first case, the grantor may grant to the grantee for life, and his heirs, that he and his heirs shall distrain for the rent,&c. and this shall amount to a new grant, and yet amount to no double charge. *Ex paucis plurima concipit ingenium.*

CHAP.

CHAP. X.

Of Attornment.

Sect. 551. *Fo.* 309. *b.*

ATtornment, is an agreement of the Tenant to the grant of the Seigniory, or of a Rent; or of the Donee in Tail, or Tenant for life or years, to a grant of a reverſion or remainder made to another. *Bract. l.*2. *fo.* 81. *Brit. f.*105. *b.*176, & 177.

Si dominus Attornare poſſit ſervitium tenentis contra voluntatem tenentis, tale ſequeretur inconveniens, quod poſſit eum ſubjugare capitali inimico ſuo, & per quod teneretur ſacramentum fidelitatis facere ei qui damnificare intenderat.

Every Grant muſt take effect as to the ſubſtance thereof, in the life both of the grantor and the grante, *l.*1. *fo.*104, 105. *Shelleys* Caſe.

Since *Littleton* wrote, if a Fine be levied of a Seigniory, &c. to another, to the uſe of a third perſon and his heirs, he and his heirs ſhall diſtrain without any Attornment, becauſe he is in by the Statute of 27 *H.*8. *cap.*10. by transferring the eſtate to the uſe and ſo he is in by act in Law, *lib.*6. *fol.*68. Sir *Moyle Finches* Caſe.

So it is if a man by deed indented and inrolled according to the Statute, bargain and ſell a Seigniory &c. to another, the Seigniory ſhall paſs without Attornment; and ſo it is of a Rent, a Reverſion, and a Remainder, 27 *H.* 8. *cap.*16. *Vide Sect.*584.

But if the Conuſee of a Fine, before any Attornment by Deed indented and inrolled, bargain and ſell the Seigniory to another, the bargainee ſhall not diſtrain, becauſe the bargainor could not diſtrain, *& ſic de ſimilibus*; for *Nemo poteſt plus*

plus juris ad alium transferre quam ipſe, vide *Sect.* 144. where upon a Recovery, the Recoveror ſhall diſtrain and avow without Attornment.

A grant to the King, or by the King to another, is good without Attornment, by his Prerogative, 49 *E.*3.4. 34 *H.*6.1. 6*E.*4.13.

If there be Lord Meſne and Tenant, and the Meſne grant over his Meſnalty by Deed, the Lord releaſe to the Tenant, whereby the Meſnalty is extinct, and there is a rent by ſurpluſage, an Attornment to the grantee of this rent ſeck is good, although the quality of that part of the rent is altered, becauſe it is altered by act in Law.

If a reverſion of two acres be granted by Deed, and the leſſor before Attornment levy a Fine of one of them, and the Tenant attorn to the grantee by Deed, this is good for the other acre.

If the reverſion be granted of three acres, and the leſſee agree to the ſaid grant for one acre, this is good for all three, and ſo it is of an Attornment in Law, if the reverſion of three acres be granted, and the leſſee ſurrender one of the acres to the grantee &c. 18 *E.*3. *Variance* 63. 22 *E.*3.18.*l.*2. *fo.*67. *b. Tookers* caſe *fo.*309.*b.*

Reg. the Attornment muſt be according to the grant, either expreſly or impliedly, 39 *H.*6. 3.

Impliedly, as if a reverſion be granted to two by Deed, and the leſſee Attorn to one of them according to the grant, this Attornment ſhall enure to both the grantees; and ſo it is if one grantee dye, the Attornment to the ſurvivor is good 11 *H.*7.12.

If the Lord grant by Deed his Seigniory to A. for life, the remainder to B. in fee, A dyeth, and then the Tenant Attorn, to B. this Attornment is void, becauſe it is not according to the grant, for then B. ſhould have a remainder, without any particular eſtate, 20 *H.*6.7.

If a reverſion be granted to a man and a woman, they are to have moities in Law; but if they intermarry, and then Attornment is had, they ſhall have no moities, becauſe

cauſe it is by Act in Law, *Pl. Com.* 187,483.

If a feme grant a reverſion to a man in fee, and marry with the grantee, the leſſee Attorn to the husband, this is a good Attornment in Law to the husband, 2 *R.*2. *Attornment* 8.

If a reverſion be granted by Deed to the uſe of *I.S.* and the leſſee hearing the Deed read; or having notice of the contents thereof, Attorn to *Ceſtuy que uſe*, this is an implied Attornment to the grantee, *l.*4.*fo.*61. *Hemings* caſe.

*Sect.*552. *fo.*310.*a.& b.*

Note that *Littleton* expreſſeth not what eſtate is granted, and very materially, for if the former grant were in fee, and the latter grant were for life, and the Tenant doth firſt attorn to the ſecond grantee, he cannot after attorn to the firſt grantee to make the fee-ſimple paſs, for that ſhould not be according to the grant, but in that caſe the Attornment to the firſt is countermanded.

If a reverſion upon an eſtate for years be granted in fee, and the leſſor confirm the eſtate of the leſſee for life, he cannot afterwards attorn. And ſo it is if the grantor before Attornment confirm the eſtate of the leſſee for life in Tail, &c.

If a feme ſole make a leaſe for life or years reſerving a rent, and grant the reverſion in fee, and taketh husband, this is a countermand of the Attornment, 11*H.*7.19.

If in the caſe that our Author here putteth of ſeveral grantees, if the Tenant attorn to both of them, the Attornment is void, becauſe it is not according to the grant.

If a reverſion be granted for life, and after it is granted to the ſame grantee for years, and the leſſee attorn to both grants, it is void for the uncertainty, 11*H.*7.12.

A multo fortiori, if the Lord by one Deed grant his Seigniory to *I.* Biſhop of *London*, and to his heirs, and by another Deed to *I.* Biſhop of *London*, and to his ſucceſſors, and the Tenant attorn to both grants, the Attornment is void, for

for albeit the grantee be but one, yet he hath ſeveral capacities, and the grants are ſeveral, and the Attornment is not according to either of the grants.

But if *A* grant the reverſion of Black-acre or White-acre, and the leſſee attorn to the grant, and after the grantee maketh his election, this Attornment is good, for albeit the eſtate was incertain, yet he Attorneth to the grant in ſuch ſort as it was made. And ſo note a diverſity between one grant and ſeveral grants; and obſerve an Attornment good in expectation, which paſſed by the election ſubſequent.

Sect. 553. *Fol.* 301. *a.*

Note, that when a man maketh a feoffment of a Manor, the ſervices do not paſs but remain in the feoffor, until the Freeholders do attorn, and then the Attornment ſhall have relation to ſome purpoſe, and not to other; for albeit the Attornment be made many years after this feoffment, yet it ſhall have relation to make it paſs out of the feoffor, *ab initio*, even by the livery upon the feoffment, but not to charge the Tenants with any mean arrearages, or for waſte in the mean time, &c. *Temps E.* 2. *Attorn* 48 *E.* 3. 15.

If a reverſion of land be granted to an alien by Deed, who is made Denizen, and then the Attornment is made, the King upon Office found, ſhall have the land: for as to the eſtate between the parties, it paſſed by the Deed *ab initio*, *P.* 5 *E.* 3. *Coram Rege Suſſex in Theſaur.* 21 *E.* 3. 47.

If a man plead a feoffment of a Manor, he need not plead an Attornment of the Tenants, but (if it be material) it muſt be denied, or pleaded of the other ſide, 34 *E.* 3. *Double Plea* 24. 42 *Aſſ. p.* 6.

And upon this conſideration had of all the Books touching this point, whether the ſervices of the Freeholders do paſs, wherein there have been three ſeveral opinions, *viz.* ſome have holden that the ſervices do paſs in the right, by the livery, as parcel of the Manor, but not to avow before Attornment, as in the caſe of the Fine. And others have holden, that

that they do paſs in right and poſſeſſion, to diſtrain without Attornment. 26*E* 3. *per quæ ſervitia* 21.8*H.*4.1.*b.*12*H.*4. 20*H.*6. 7.35*H.*6.9.4*E.*4.33.13*H.*7.14.*a.*1*H* 7. 31.4*E.*4.*Attorn.Br.*30.

And the third opinion is, that in this caſe the ſaid ſervices paſs neither in poſſeſſion, nor in right, but until Attornment remain in the Alienor, as *Littleton* here holdeth; and ſo it was reſolved. *P.*15*Eliz.* between *Brasbitch* and *Barwell. Vide* *H.*14*Eliz. Rot.*508.*in Com.B.*

*Sect.*590,591.*Fo.*324.

Si home fait done en tail, ou leaſe pur terme de vie, ou pur terme d'ans del parcel del demeſne d'un Manor,&c. Savant le reverſion a tiel donor, ou leſſor, &c. & puis il ſoit diſſeiſie del Manor,&c. & le diſſeiſor mor' ſeiſe, &c. & ſon heir ſoit eins per diſcent, uncore tiel donor, &c. diſtreina pur le rent arere; & tiel reverſion apres tiel diſſeiſin eſt ſever del Manor en fait,coment que ne ſoit ſever en droit.

And ſo note a diverſity between rents and ſervices parcel of a Manor, and Rents and Services incident to a reverſion parcel of a Manor. And the reaſon of this diverſity is, for that as long as the donee in tail, leſſee for life or leſſee for years, are in poſſeſſion, they preſerve the reverſion in the donor or leſſor, and ſo long as the reverſion continues in the donor or leſſor, ſo long do the rents and ſervices, which are incidents to the reverſion belong to the donor or leſſor. Neither can the donor or leſſor be put out of his reverſion, unleſſe the donee, or leſſee be out of their poſſeſſion, &c. But if the donee or leſſee make a regreſſe, and regain their eſtate and poſſeſſion, thereby they do *ipſo facto* reveſt the reverſion in the donor or leſſor.

And note, when a man is ſeiſed of a Manor and maketh a gift in tail, or Leaſe for life, &c. Of parcel of the demeſn of the Manor; the reverſion is part of the Manor, and by the grant of the Manor the reverſion ſhall paſs with the Attornment of the Donee or leſſee. But if the Lord make a gift or a Leaſe for life of the whole Manor, except bl. acre

parcel

parcel of the demeſne of the Manor, and after he grant away his Manor, B. acre ſhall not paſſe, becauſe during the eſtate tail, or Leaſe for life, it is ſevered from the Manor. And ſo note a diverſity, that a reverſion of part, may be parcel of a Manor in poſſeſſion, but a part in poſſeſſion cannot be parcel of the reverſion of a Manor expectant upon any eſtate of freehold. But if a man make a Leaſe for years of a Manor except B. acre, and after grant away the Manor, B. acre ſhall paſſe, becauſe the freehold being entire, it remaineth parcel of the Manor, and one *præcipe* of the whole Manor ſhall ſerve. But otherwiſe it is in caſe of a gift in tail, or Leaſe for life, excepting any part, there muſt be ſeveral Writs of *Præcipe*, becauſe the freehold is ſeveral, 18 *Aſſ.p.*2.38 *H.*6. 33 *Pl.Com.Fu'merſtons* caſe. 103. *lib.*5. 11. 22. 25. 19 *E.*2. *breve* 845. 4 *E.*3.*briefe.*713.

Now lets return to the precedent Sections.

Sect. 534. *Fol.* 311. *a.*

No man ſhall attorne to any grant of any Signiory, rent ſervice, reverſion, or remainder, but he that is immediately privy to the grantor,

Sect. 556. *Fol.* 311. *b.*

Here obſerve a diverſity, between a rent ſervice, and a rent charge, or a rent ſeck. And therefore (without reſpect of any privity) the diſſeiſor only in caſe of a rent charge, ſhall attorn, becauſe he is Tenant of the freehold, but in caſe of a grant of a rent ſervice, the attornment of the diſſeiſee ſufficeth. 21 *H.*6.9.*b.*

It was holden by *Dyer* and *Mounſon*, in the Argument of *Bracebridges* caſe; that if he that hath a rent charge, granteth it over for life, and the Tenant of the Land attorn thereunto, and after he grant the reverſion of the rent charge, that the grantee for life may attorne alone; and that theſe words of *Littleton* are to be underſtood, when a rent charge, or rent ſeck is granted in poſſeſſion, and a *quid juris clamat*, in that caſe,

caſe, did lye againſt the grantee for life. 46 *E.*3.27. 2 *H.*6.9. *Vide Littleton Sect.*549,& 553.

A man maketh a Leaſe for life, and after grants to *A.* a rent-charge out of the reverſion. *A.* grants the rent over, he in the reverſion muſt attorn, and not the Tenant of the freehold, for that the freehold is not charged with the rent; for a releaſe made to him by the grantee, doth not extinguiſh the rent; and *Littleton* is to be underſtood, that the Tenant of the freehold muſt attorn, when the freehold is charged. *Vide fo.*312.*a.*

Littleton ſpeaketh of five kinds of Inheritances, whereto an Attornment is requiſite. 1. Of a Seigniory, rent-ſervice, &c. 2. Of a rent-charge, 3. Of rent-ſeck. 4. Of a reverſion. 5. Of a remainder of Lands. For the Tenant ſhall never need to attorn, but when there is tenure, attendance, remainder, or payment of a rent. And therefore if an annuity, common of paſture, common of eſtovers, be granted for life, or years, &c. the reverſion may be granted without any Attornment. 21 *H.* 7.1.1 *H.*5.1.37 *Aſſ.*14.36 *Aſſ.p.*3.31 *H.*8. *Attorn.Br.*59.

*Sect.*557. *Fol.*312.*b.*

In this caſe of *Littleton* by this eſcheat of the remainder, the Seigniory is extinct, for the fee-ſimple of the Seigniory being extinct, there cannot remain a particular eſtate for life thereof in reſpect of the tenure, and attendance over. 3 *H.*6. 1 *Old Tenures* 107. 15 *E.*4.15.*a. per Littleton.*

But otherwiſe it is of a rent-charge in fee, for if that be granted for life, and after he in the reverſion purchaſe the Land, ſo as the reverſion of the rent-charge is extinct, yet the grantee for life ſhall enjoy the rent during his life, for there is no tenure or attendance in this caſe.

*Sect.*558,559. *Fo* 313.*a.*

Littleton now cometh to ſpeak of Attornments in Law or implied. 3 *E.*3.42. 15 *E.*3. *Attorn* 11.

If the Lord grant his Signiory to the Tenant of the land,

and to a ſtranger; and the Tenant accept the Deed, this acceptance is a good Attornment to extinguiſh the one moity, and to veſt the other moity in the grantee.

Suſpence, is when a Seigniory, Rent, profit apprender, &c. by reaſon of unity of poſſeſſion of the Rent, Seigniory, &c. of the Land out of which they iſſue, are not in *eſſe* for a time; and they are ſaid to be extinguiſhed, when they are gone for ever, and can never be revived, that is when one man hath as high and perdurable eſtate in the one, as in the other.

Sect. 560, 561. *Fol.* 313. *a.* & *b.*

Note, that albeit a grant may enure by way of releaſe, and a releaſe to the Tenant for life doth work an abſolute extinguiſhment, whereof he in the remainder ſhall take benefit, yet the Law ſhall never make any conſtruction againſt the purport of the grant to the prejudice of any, or againſt the meaning of the parties, &c. *Vide lib.* &c.

Sect. 562. *Fo.* 314, *a.*

Note a diverſity when the whole eſtate in the Seigniory is ſuſpended, and when but part of the eſtate in the Seigniory is ſuſpended but for terme of life, and therefore as to all things concerning the right it hath its being, but as the poſſeſſion during the particular eſtate, the grantee ſhall take no benefit, therefore during that time, he ſhall have no Rent-ſervice, Wardſhip, Relief, Heriot, &c. becauſe theſe belong to the poſſeſſion, but if the Tenant dieth without heir, the Tenancy ſhall eſcheat unto the grantee, for that it is in the right, and yet when the Seigniory is revived by the death of the Tenant, there ſhall be wardſhip, as if the Tenant marry with the Seignioreſs and dieth, his heir within age, they ſhall have the wardſhip of the heir. Alſo in the caſe that *Littleton* here putteth, albeit the Seigniory be ſuſpended but for life; yet ſome hold, that he cannot grant it over, becauſe the grantee took it ſuſpended, and it was never in *eſſe* in him, but if the Tenant make a Leaſe for years, or for life

to

to the Lord, there the Lord may grant it over, becauſe the Seigniory was in *eſſe* in him, and the fee-ſimple of the Seigniory is not ſuſpended; but if the Lord diſſeiſe the Tenant, or the Tenant infeoff the Lord upon condition, there the whole eſtate in the Seigniory is ſuſpended; and therefore he cannot during the ſuſpenſion, take benefit of any eſcheat or grant over his Seigniory. 34 *Aſſ. p.* 15. 16 *E.* 3. *vouch.* 83. 5 *E.* 3. *Twongs* Caſe.

Sect. 563, 564. *Fo.* 314.

Attornment for part, cannot be void for that, and good it cannot be unleſs it be for the whole. 4 *E.* 3. 55. *Malmans* Caſe, 5 *E.* 4. 2. 7 *H.* 4. 10. 35 *H.* 6. 8. *per Priſot.*

And payment of any parcel of the ſervices, is an agreement in Law to the grant. 40 *E.* 3. 34.

Intentio inſervire debet legibus, non leges intentioni, 20 H. 6.

Judgment in *ſcire facias pur parcell de les ſervices eſt bon attorn' en ley, coment que il eſt preſume, quod judicium redditur in invitum.* 48 E. 3. 24. 37 H. 6. 14. per *Moyle*, 17 E. 3. 29.

Note that in caſe of Deed, nothing paſſeth before Attornment.

In the caſe of the fine, the thing granted paſſeth as to the ſtate, but not to diſtrain, &c. without Attornment. In the caſe of the King, the thing granted doth paſs both in eſtate and in privity to diſtrain, &c. without Attornment, unleſs it be of Lands or Tenements, that are parcel of the Dutchy of *Lancaſter*, and lye out of the County Palatine.

Sect. 565. *Fo.* 315. *b.*

Note a diverſity between money given by way of Attornment, and where it is given as parcel of the rent, by way of ſeiſin of the rent. And therefore a payment in name of ſeiſin is more beneficial for the grantee, becauſe this is both an actual ſeiſin, and an Attornment in Law, and yet being given before the day in which the Rent is due, it ſhall not be abated out of the Rent. 39 *H.* 6. 3. 26. 5 *E.* 4. 2. *Vide S.* 235. 7 *H.* 4. 2. *Atturney Br.* 97.

*Sect.*566.

As of an Attornment, ſo a ſeiſin of a rent by the hands of one Joyntenant is good for all, and a ſeiſin of part of the rent is a good ſeiſin of the whole. *Lib.*2.*fo.*67, *Bookers* caſe.

If either the grantor, or grantee die, the Attornment is countermanded; but if the Tenant die, he that hath this eſtate may attorn at any time; If the Tenant grant over his eſtate, his Aſſignee may attorn. *Lib.*4.*fo.*8.*l.*6.*fo.*57.*l.*9.*fo.*34. 4*H.*6. 29.18*E.*4.10.

If an Infant hath Lands by purchaſe, or by diſcent, he ſhall be compelled to attorn in a *Per quæ ſervitia.* 42*E.*3.*Age* 33. 18*H.*6.2.*l.*9.*fo.*84,85.*Coyns* caſe, 4*M.Dy.*137.7*E.*2.*Age* 140.

If an Infant be leſſee, he ſhall be compelled to attorn in a *Quid juris clamat*; the Attornment of an Infant to a grant by Deed is good, and ſhall bind him, becauſe it is lawful, albeit he be not upon that grant by Deed compellable to attorn.

*Sect.*567. *Fo.*315.*b.*

The grant of a reverſion by Deed, with the Attornment of leſſee for years, do countervail in Law, a feoffment by livery, as to the paſſing of the freehold and inheritance.

And Tenant by Statute Merchant, or Staple, or by Elegit, muſt alſo attorn, for the grantee may have a *Venire facias ad computand.* or tender the mony, &c. and diſcharge the Land: and if the reverſion be granted by Fine, they ſhall be compelled to attorn in a *Quid juris clamat.* 6*E.*3.53.25*E.*3.53. *Br. Attor.* 48.32*E.*3.*Scire fac.*101.*Dy.*1.*a.*

And ſo the Executors that have the Land until the debts be paid, muſt attorn upon the grant of the reverſion, although they have not any certain term for years.

*Sect.*568. *Fol.*316.*a.*

If Tenant in Dower, or by the curteſie grant over his or her eſtate, and the heir grant over the reverſion, the Tenant in Dower, or by the Curteſie may attorn, becauſe at the time

time of the grant made, they were attendant to the heir in reverſion, and the grantee cannot be Tenant in Dower, or by the Curteſie; and if the reverſion be granted by Fine, the Fine muſt ſuppoſe that the Tenant in Dower, or by the Curteſie, did hold the land, albeit they had formerly granted over their eſtate and albeit the reverſion doth paſſe by the Fine, yet the *Quid juris clamat* muſt be brought againſt him that was Tenant, at the time of the note levied; and the grantee of the reverſion muſt bring an action of waſte againſt the Aſſignee of Tenant in Dower, or by the Curteſie, for they themſelves cannot hold of any but of the heirs; and therefore in reſpect of the privity they ſhall attorn, and be ſubject to an action of waſte, as long as the reverſion remaineth in the heir, albeit they have granted over their whole eſtate: and note that if the grantee of the reverſion, doth bring an action of waſt againſt the Aſſignee of Tenant by the Curteſie, the plaintiff muſt rehearſe the Statute, which proveth that no prohibition of waſte, in that caſe lay at the common Law, as it did, if the heir had brought it againſt the Tenant by the Curteſie himſelf: and therefore ſome do hold, that if the heir do grant over the reverſion, that the Attornement of the Aſſignee of the Tenant by Curteſie, or of Tenant in Dower is ſufficient, becauſe they afterward, muſt be attendant, and ſubject to the Action of waſte. 10.*H.* 4 *Attornment* 16.11 *H.*4.18 *F.N.B.*55 *E. Reg, fo.*72.4 *E.*3.26.

If the reverſion of leſſee for life be granted, and leſſee for life Aſſign over his eſtate, the leſſee cannot attorne, but the attornment of the Aſſignee is good, becauſe it behoveth that the Tenant of the land do attorn, and after the Aſſignment there is no tenure or attendance, &c. between the leſſee and him in reverſion. 18*E.*4.10.*b.*26 *E.*3.62.5 *H.*5.10.

*Sect.*569,570,571,572,573. *Fo.*316.*b.*

No *Quid juris clamat* lyeth againſt Tenant in tail, but if a man make a gift in tail, the remainder in fee, and the Seigniory, or rent charge iſſuing out of the land be granted by

Fine, the Conuſee ſhall maintain a *Per quæ ſervitia*, or a *Quem redditum*, and compel him to Attorn, for herein his eſtate of inheritance is no priviledge to him, for that a Tenant in fee-ſimple (as his Eſtate was at the Common Law) is alſo compellable in theſe caſes to attorn.

Lou le reverſion eſt dependant ſur leſtate del franktenement, ſuffiſt que le tenant del franktenement attorn ſur grant del reverſion, &c. Si leaſe pur terme d'ans, &c. ou done en le tail, ſoit fait reſerv' un rent, per le grant del reverſion en tiel caſe, le rent paſſera, pur ceo que tiel rent eſt incident al reverſion, & nemy è converſo,

If a man let land to another for life, and after he confirm by his Deed, the eſtate of the Tenant for life, the remainder to another in fee, and the Tenant for life accept the Deed, &c. Albeit he in the remainder in this caſe hath no remedy to come to the Deed, during the life of Tenant for life, yet becauſe he is privy in Eſtate; he ſhall not maintain an action of waſte, without ſhewing the Deed, but when the remainder is once executed, he ſhall not need to ſhew the Deed. *Vide Pl.Com.Colthirſts* Caſe, *D. & St.Ch.*20. *fol* 93,94. *Pl. Com.* 149. *Throckmortons* Caſe, 45*E.*3.14,15. 11*H.*4.39. 14*H.*4.31.

As in Phyſick, *nullum medicamentum eſt idem omnibus*, ſo in Law one form or preſident of conveyance will not fit all caſes.

Sect. 574. *Fo.* 318. *a.*

If one Joyntenant make a Leaſe for years, reſerving a rent and dye, the ſurvivor ſhall not have the rent, and therefore *Littleton* here addeth materially, for the privity that was between the Tenant for life, and them in the reverſion. 2 *Eliz. Dyer* 176.

Tenant for life ſhall not be compelled to attorn in a *Quid juris clamat* upon the grant of a reverſion by Fine holden of the King himſelf without licence: for it is a general Rule, that when the grant by fine is defeaſible, there the Tenant ſhall be compelled to attorn. 45*E.*3.6.*b.*13*Eliz.Dy.*188.*Lib.*3. *fo.*86. Juſtice *Windhams* Caſe, 36*H.*6.24.

As

As if an Infant levy a Fine, this is defeaſible by Writ of Error during his minority, and therefore the Tenant ſhall not be compelled to attorn.

So if the land be holden in ancient Demeſn, and he in the reverſion levy a Fine of the reverſion at the Common Law, this is reverſible in a Writ of Deceit, &c. 5*E.*3.25. 3*E.*3. *Ancient Demeſne* 16.

So if an Alienation be in Mortmain, the Lord Paramount may defeat it, &c. 17*E.*3.7.22*E.*3.18.

So if a Tenant in tail had levied a Fine it was defeaſible by the iſſue in tail. 24*E.*3.25.*b.*37*H.*6.33.48*E.*3.23.

But now the Statute of 4 *H.* 7. 32 *H.* 8. having given a further ſtrength to Fines to bar the iſſue in tail, the reaſon of the Common Law being taken away, the Tenant in this caſe ſhall be compelled to attorn. *Windhams* Caſe, *ubi ſuprà.*

Sect. 576, 577. *fo.* 319. *a.*

Where a leaſe is made for life, ſaving the reverſion to the leſſor, if the leſſor diſſeiſe the leſſee, and make a feoffment in fee, if the Tenant for life enter, and make waſte, the feoffee ſhall have a Writ of Waſte without any other Attornment; for the leſſee ſhall not be miſconuſant of the Feoffments that were made of and upon the ſame land. And the reaſon of the Attornment is, becauſe the whole fee-ſimple paſs by the feoffment, and the leſſee by his regreſs leaveth the reverſion in the feoffee, which is a good attornment. The ſame Law it is of a Tenant by Statute Merchant, or Staple or Elegit; and ſo it is of a leaſe for years, 46*E.*3.30.*b.* 2*H.*5.4. 5*H.*5.12. *Brabitches* Caſe, *P.* 15 *Eliz.*

Some do hold, that in that caſe, if the leſſee for life do recover in Aſſize, this is no Attornment, becauſe he comes to it by courſe of Law, and not by his voluntary act. And yet in that caſe, as in the caſe of the Fine, the ſtate of the reverſion is in the feoffee.

But others do hold it all one in caſe of a recovery and a

regreſs, 18 *E.*3.48 *b.lib.*6.*fol.*60.*b.* Sir *Moyle Finches* Caſe.

If the leſſor diſſeiſe Tenant for life, or ouſte Tenant for years, and make a feoffment in fee, by this the rent reſerved upon the leaſe for life or years is not extinguiſhed; but by the regreſs of the leſſee the rent is revived, becauſe it is incident to the reverſion

But if a man be ſeiſed of a rent in fee, and diſſeiſe the Tenant of the land, and make a feoffment in fee, the Tenant re-enter, the rent is not revived.

And ſo note a diverſity between a rent incident to a reverſion, and a rent not incident to a reverſion, 9 *H.* 6. 16. Dean of *Pauls* Caſe, 20 *Eliz.*

If a man make a leaſe for life, and then grant the reverſion for life, and the leſſee attorn, and after the leſſor diſſeiſe the leſſee for life, and make a feoffment in fee, and the leſſee re-enter, this ſhall leave a reverſion in the grantee for life, and another reverſion in the feoffee, and yet this is no Attornment in Law of the grantee for life, becauſe he doth no act, nor aſſent to any which migh amount to an Attornment in Law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in poſſeſſion: So as he may well be miſconuſant of the feoffment made upon the land, and ſo out of the reaſon of *Littleton.* But yet the reverſion in fee doth paſs to the feoffee.

Sect. 578, 579. *fo.* 319.*b.*& 320. *a.*

Where the Anceſtor taketh an eſtate of Freehold, and after a remainder is limited to his right heires, the fee ſimple veſteth in himſelf, as well as if it had been limited to him and his heirr, for his right heirs are in this caſe words of limitation of eſtate, and not a Purchaſe. Otherwiſe it is where the Anceſtor taketh but an eſtate for years: As if a leaſe for years be made to A. the remainder to B. in Tail, the remainder to the right heirs of A. there the remainder veſteth not in A. but the right heir ſhall take by purchaſe, if A. dye during the eſtate Tail; for as the Anceſtor and the heir are

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Correlativa of Inheritance, ſo are the Teſtator and Executor, and the Inteſtate and Adminiſtrator of Chattels. *Quod vanum & inutile eſt, lex non requirit.* Vide *Sect.* 194. 273. *fo.* 320. *a.*

The Conuſee of a Fine before Attornment, cannot diſtrain, becauſe an Avowry is in lieu of an action, and thereunto privity is requiſite. So likewiſe, and for the ſame cauſe he can have no action of Waſte, nor Writ of Entry *ad Com. legem*, or *in conſimili caſu*, or *in caſu proviſo*, Writ of Cuſtoms, and Services, nor Writ of Ward, &c. 8 *E.* 3. 44. 34 *H.* 6. 7. 12 *E.* 4. 4. 40 *E.* 3. 7. 5 *H.* 5. 12. 3 *E.* 2. *Droit* 33.

But if a man make a leaſe for years, and grant the reverſion by Fine, if the leſſee be ouſted, and the Conuſe diſſeiſed, the Conuſee without Attornment ſhall maintain an Aſſize, for this Writ is maintained againſt a ſtranger, where there needeth no privity: and ſuch things as the Lord may ſeiſe or enter into without ſuing any action, there the Conuſee before any Attornment may take benefit thereof, as to ſeiſe a Ward, or Heriot, or to enter into the Lands or Tenements of a Ward, or eſcheated to him, or to enter for an alienation of Tenant for life or years, or of Tenant by Statute Merchant, Staple or Elegit, to his diſheriſon.

Sect. 580, 581, 582. *Fo.* 320. *a. b.*

It is ſaid in our Books, that if Tenant for life have a priviledge not to be impeachable of Waſte, or any other priviledge, if he doth attorn without ſaving his priviledge, that he hath loſt it, which is to be underſtood, where the attorneth in a *Quid juris clamat* brought by the Conuſee of a Fine, for that the Writ ſuppoſeth him to be but a bare tenant for life, and by his general Attornment according to the Writ he is barred for ever to claim any priviledge but a bare eſtate for life. But if upon a grant of the reverſion by Deed, the Tenant for life doth attorn, he loſeth no priviledge, for there can be no concluſion or barr by the Attornment in *paiis*; and ſo it is of an Attornment in Law.

As if the leſſor diſſeiſe the leſſee for life, and make a Feoffment in fee, and the leſſee reenter, &c. 43 *E.*3.5. 45 *E.*3.6. 39*H.*6.25.*F.N.B.*136.*b.*

But in the *Quid juris clamat*, if the Plaintiff be within age, ſo as he cannot acknowledge the priviledge, the Tenant ſhall not be compelled to attorn until his full age, when he may acknowledge it, 43*E.*3.5.

But otherwiſe it is (as ſome hold) if a *Quid juris clamat* be brought by Baron and Feme, the priviledge ſhall be entred into the Roll, notwithſtanding ſhe is a feme covert, 45*E.*3.11. *a.Vet.N.B.in per quæ ſervitia*, 39*H.*6.25.18*E.*4.7.

And in a *Per quæ ſervitia* brought by the Conuſee of the Meſne, the Tenant may ſhew that he held by Homage Auncеſtrel, and ſaving to him his Warranty and Acquittal, he is ready to attorn. So if the Tenant hath any other Acquittal, and the Meſne levy a Fine to one for life, the remainder to another in fee, the Tenant for life bringeth a *Per quæ ſervit.* and the Tenant is ready to attorn, ſaving his Acquittal, and the Plaintiff acknowledge it, and thereupon Tenant attorn, Tenant for life dieth; in this caſe albeit Reg. the Attornment to the Tenant for life is Attornment to him in remainder, yet in this caſe he in the remainder ſhall not diſtrain, till he hath acknowledged the Acquittal, which muſt be in a *Per quæ ſervit.* brought by him againſt the Tenant, *vide S.* 557.

*Sect.*583. *Fol.*321.*a.*

Note a diverſity between an act in Law, that giveth one inheritance in lieu of another, and an act in Law that conveyeth the eſtate of the Conuſee only. Of the former *Littleton* here putteth an example, of the eſcheat of the Meſnalty, which drowneth the Seigniory paramount, and therefore reaſon would that the Lord by this act in Law ſhould have as much benefit of the Meſnalty eſcheated, as he had of the Seigniory that was drowned, and he hath no remedy to compel the Tenant to Attornment.

Alſo the Lord cometh to the Meſnalty by a Seigniory Paramount,

amount, and therefore needeth no Attornment. As if leſſee for life be of a Manor, and he ſurrender his eſtate to the leſſor, there needs no Attornment of the Tenants, becauſe the leſſor is in by a Title Paramount *Temps E.2. Attor.* 18. 39 *H.* 38. *per Priſot, lib.6.f.*68. Sir *M. Finches* Caſe, 5 *H.*7.18. *per Cur.*

But if the Conuſee dye, and the Law caſteth his Seigniory upon his heir by diſcent, he ſhall not be in any better eſtate than his Anceſtor was, becauſe he claimeth as heir meerly by the Conuſee.

*Sect.*584. *Fol.*321. *b. vide, &c.*

If a man make a leaſe for life or years, and after levy a Fine to *A.* to the uſe of *B.* and his heirs, *B.* ſhall diſtrain, and have an action of Waſte, albeit the Conuſee never had any Attornment, becauſe the reverſion is veſted in him by force of the Statute, and hath no remedy to compel the leſſee to attorn, 27 *H.*8.*c.*10.

*Sect.*585, 586. *Fo.*322. *a. b.*

Here doth *Littleton* put a caſe where a man may have a Seigniory, rent, reverſion or remainder, meerly by the act of the party, and may diſtrain, and have any action without any Attornment; and that is by deviſe of lands deviſeable by Cuſtom, when *Littleton* wrote, by the laſt Will and Teſtament of the owner, 34 *H.*6.6. 5 *H.*7.18. *F.N.B.*121. *n.*

Omne Teſtamentum, morte conſummatum ultima voluntas teſtatoris eſt perimplenda ſecundum veram intentionem ſuam, & reipublicæ intereſt ſuprema hominum teſtamenta rata haberi. The Will of the Deviſor expreſſed by his Teſtament, ſhall be performed according to the intent of the Deviſor, and it ſhall not lie in the power of the Tenant or Leſſee to fruſtrate the will of the Deviſor by denying his Attornment, *vide S.* 167. *Brit. fol.*78. & 212. *b.*

Sect.

*Sect.*587,588,589. *Fol* 323. *a. b.*

The diſſeiſor cannot diſſeiſe the Lord of the Rents or Services, without the Attornment of the Tenants to the diſſeiſor; for ſeeing an Attornment is requiſite to a Feoffment and other lawful Conveyances, *à fortiori*, a diſſeiſor or other wrong doer ſhall not gain them without Attornment. The like Law is of an Abator, and an Intrudor. But albeit the diſſeiſor hath once gotten the Attornment of the Tenants, and payment of their rents, yet may they refuſe afterwards for the avoiding of their charge. And here the Attornment of the Tenant of a Manor to a diſſeiſor of the Demeſns, ſhall diſpoſſeſs the Lord of the rents and ſervices parcel of the Manor, becauſe Demeſns, Rents, and Services make but one intire Manor, and the Demeſns are the principal: but otherwiſe it is of rents and ſevices in groſs. 6*H.*7.14.11*H.*7.28. 11*H.*4.14. *a. b.*

For a man cannot be diſſeiſed of a rent-ſervice in groſs, rent-charge, or rent-ſeck by Attornment, or payment of the rent to a ſtranger, but at his election; for the Rule of Law is, *Nemo redditum alterius invito Domino percipere aut poſſidere poteſt, & vide S.*237,238,239,240.

What be diſſeiſins of rent-ſervices, rent-charge, and rent-ſecks, and payment to a ſtranger, is none of them, but at the Lords election. 24*E.*3.4.1*E.*5.5.

A diſcent of a rent in groſs bindeth not the right owner, but that he may diſtrain, albeit he admitted himſelf out of poſſeſſion, and determined his election, as by bringing of an Aſſize, &c. 5*E.*4.1.23*H.*3.*Aſſ.*439.16*Aſſ.p.*15.

CHAP.

***CHAP. XI.

Of Diſcontinuance.

Sect. 592. *Fol.* 325. *a.*

Diſcontinuare nihil aliud ſignificat quàm intermittere deſueſcere, interrumpere. 8 *H.* 4. 8. *b.* 11 *H.* 4. 85. *b.*

A diſcontinuance of eſtates in Lands or Tenements, is properly (in legal underſtanding) an alienation made or ſuffered by Tenant in tail, or by any that is ſeiſed in *auter droit*, whereby the iſſue in tail, or the heir, or ſucceſſor, or thoſe in reverſion or remainder are driven to their action, and cannot enter. I have added (*properly*) by good warrant of our Author himſelf, for *Sect.* 470. he uſeth Diſcontinuance for a deveſting or diſplacing of a reverſion, though the entry be not taken away. Alſo *vide* the Statute of 1 *E.* 6. *c.* 7. 31 *Eliz. c.* 2. *l.* 7. *fo.* 30, 31. *le caſe de Diſcontin. de proceſſe.*

When *Littleton* wrote, the eſtate in Lands and Tenements might have been diſcontinued five manner of ways. *viz.* By Feoffment, by Fine, by Releaſe with Warranty, Confirmation with Warranty, and by ſuffering of a Recovery of a *Præcipe quod redd.* and this was to the prejudice of five manner of perſons, *viz.* of Wives, of Heirs, of Succeſſors of thoſe in Reverſion, and of thoſe in Remainder. But for Wives and their Heirs, and for Succeſſors, the Law is altered by Acts of Parliament ſince *Littleton* wrote.

Sect. 593. *Fol.* 325. *b.*

Nota, that in Law the Covent, albeit they be Regular, and dead perſons in Law, yet are they ſaid in Law to be *Capitulum* to the Abbot, as well as the Dean and Chapter that be Secular

cular to the Biſhop. But it is to be obſerved, That a ſole Body Politick that hath the abſolute right in them, as an Abbot, Biſhop, &c. may make a diſcontinuance; but a Corporation aggregate of many, as Dean and Chapter, Warden and Chaplains, &c. cannot make any diſcent, for if any joyn, the grant is good, and if the Dean, Warden, &c. make it alone where the Body is aggregate of many, it is void, and worketh a diſſeiſin, 21 *E.* 4. 86. *vide Sect.* 528. *&* 648. By the Statute of 1 *Eliz. c.* 10. *&* 1 *Jac. c.* 3. Biſhops, and all other Eccleſiaſtical perſons are diſabled to alien, or diſcontinue any of their Eccleſiaſtical Livings.

Sect. 594. *Fo.* 326. *a.*

By the purview of the Statute of 32 *H.* 8. *c.* 28. the wife and her heirs after the deceaſe of her husband, may enter into the Lands and Tenements of the wife, notwithſtanding the alienation of her husband, *Dyer* 4 *&* 5 *P. & M.* 146. 3 *El. Dyer* 191. *l.* 8. *f.* 71, 72. *Greveleys* Caſe.

If the husband levy a Fine with Proclamations, and dye, the wife muſt enter, or avoid the eſtate of the Conuſee within five years, or elſe ſhe is barred for ever by the Statute of 4 *H.* 7. for the Statute of 32 *H.* 8. doth help the Diſcontinuancy, but not the bar, and the Statute ſpeaketh of a Fine, and not of a Fine with Proclamations. 6 *E.* 6. *Dyer* 72. *b.* 4 *H.* 7. *c.* 24.

Feme Tenant in Tail taketh husband, the husband maketh a feoffment in fee, the wife before entry dieth without iſſue, he in the reverſion or remainder may enter. For, 1. The reverſion or remainder cannot be diſcontinued in this caſe, becauſe the eſtate Tail is not diſcontinued. 2. The words of the Statute be, Shall not be prejudicial, &c. to the wife or heirs, or ſuch as ſhall have Right, Title or Intereſt by the death of ſuch wife, but the ſame wife and her heirs, &c. ſhall, or lawfully may enter, &c. By which words, the entry of him in the reverſion or remainder in that caſe is preſerved. The husband is Tenant in Tail, the remainder to the wife in Tail, the husband make a feoffment in fee, by this

this the husband by the Common Law did not only diſcontinue his own Eſtate tail, but his wifes remainder, but at this day after the death of the husband without iſſue, the wife may enter by the ſaid Action of 32*H.*8.

If the husband hath iſſue, and make a feoffment of his wifes land, the wife dieth, the heir of the wife ſhall not enter during the husbands life, neither by the Common Law nor by the Statute. 8*E.*2.*tit.Cui in vita* 26. 34 *E.*1.*ibid.* 30. 10 *E.*3.12.*Dyer* 21*Eliz.*363.

*Sect.*565.*Fo.*326.*b.*

By the Statute of 11 *H.* 7. *ca.* 20. If the woman hath any Eſtate in Tail joyntly with her husband, or only to her ſelf, or to her uſe in any lands or hereditaments of the Inheritance or purchaſe of her husband, or given to the husband and wife in tail, by any of the Anceſtors of the husband, or by any other perſon ſeiſed to the uſe of the husband, or his Anceſtors, and ſhall hereafter being ſole, or with any other after taken husband diſcontinue, &c. the ſame; every ſuch diſcontinuance ſhall be void, and that it ſhall be lawful for every perſon to whom the intereſt, title or inheritance, after the deceaſe of the ſaid woman ſhould appertain, to enter, &c. So as if ſuch a feme Tenant in tail, do make any diſcontinuance in fee, in tail, or for life, although it be with warranty, yet this doth not take away the entry after her death, either of the iſſue, or of him in reverſion or remainder. *Vide. Sect.*697 *l.*3.*fo.*50,51. Sir *George Brownes* caſe, and *l.*3.*f.*60,*&c. Lin. Coll.* caſe. *P.*1. *f.*176. *Mildmayes* caſe, *Dy.*3 *&* 4 *P.M.*146. *&* 8*El.Dy.*448. *&* 15 *El.*340.19*El.*354. *&* 20*El.*362.27*H.*8.23.*l.*5.*f.*79. *Fitz.* caſe, and *Grevelys* caſe, *l.*8. *f.*71,*&c.*

If Lands were intailed to a man and his wife, and to the heirs of their two bodies, and the husband had made a feoffment in fee and died, and then the wife died, this had been a diſcontinuance at the Common Law: for the title of the iſſue is as heir of both their bodies, and not as heir to a-

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ny one of them, and his entry muſt enſue his title or action. But this is remedied by the Statute of 32*H.*8.

Tenant in tail ſhall have a *Quod permittat*, 4*E.*3.38.43*E.* 3.25.4*E.*4.25.*F.N.B.*124.

And he ſhall have a writ of Cuſtoms and Services, *in le debet, & ſolet*, but ſhall not have it in the *debet* only. 2*E.*2. *droit* 28.

So he ſhall have a *Secta ad molendinum* in *le debet & ſolet*, but not in the *debet tantum*. *F.N.B.*123.

Tenant in tail ſhall have a writ of Entry in *Conſimili caſu, & un Admeaſurement, & nativo habendo, ceſſavit, eſcheat, waſte, &c.* 21*E.*3.11.5*E.*3.23.11*H.*4.49.

But tenant in tail ſhall not have a writ of Right *ſur diſclaimer*, nor a *Quo jure*, nor a *Ne injuſte vexes*, nor a *Nuper obiit*, or *Rationabile parte*, nor a *Mordanc'*, nor a *Sur cui in vita*, for theſe and the like, none but Tenant in fee ſhall have: and the higheſt Writ that the Tenant in tail can have, is a Formedon. 2*E.*3.*Droit*.28.13*H.*7.24.5*E.*4.2.20*E.*3. *Avowry* 131. *F.N.B.*10.46*E.*3.*Cui in vita* 33.

*Sect.*596,597 *fol.*327.*b.*

It is provided by the Statutes of *W.*2.*c.*1. *De donis cond' quod non habeant illi quibus tenementum ſic fuerit datum poteſtatem alienandi, &c.* So as theſe words (*non habent poteſtatem alien.*) do work theſe effects, *viz.* as to lands, that a feoffment barreth not the iſſue of his action, but worketh a diſcontinuance to bar him of his entry; as to rents or any thing in *eſſe*, that lye in grant, that the ſaid words to his power do make any diſcontinuance: as to rents, &c. newly created, that they take away his power to make them to continue longer, than during his life. 18*E.*3.12. 24*E.*3.28. 36*Aſſ.*8. 5*E.*4.4*H.*7.17. *Pl. Com. Smith* and *Stapletons* caſe.

But there is a diverſity between alienation, working a diſcontinuance of an eſtate, which taketh away an entry, and an alienation working, diveſting or diſplacing of eſtates, which take away no entry. As if there be Tenant for life, the remainder to *A.* in tail, the remainder to *B.* in fee, if

Tenant

Tenant for life doth alien in fee, this doth diveſt and diſplace the remainders, but worketh no diſcontinuance; and ſo note that to every diſcontinuance, there is neceſſary a diveſting or diſplacing the eſtate, and turning the ſame to a right: for if it be not turned to a right, they that have the Eſtate, cannot be driven to an action; & therefore ſuch inheritances as lye in grant, cannot by grant be diſcontinued, becauſe ſuch a grant diveſts no Eſtate, but paſſeth only that which he may lawfully grant, and ſo the Eſtate it ſelf doth deſcend, revert, or remain, as ſhall be ſaid hereafter.

A. maketh a gift in tail to B. who maketh a gift in tail to C. C. maketh a feoffment in fee, and dyeth without iſſue. B. hath iſſue and dyeth, the iſſue of B. ſhall enter, for albeit the feoffment of C. did diſcontinue in reverſion of the fee ſimple, which *B.* had gained upon the Eſtate tail made to C. yet it could not diſcontinue the right of entail which B. had, which was diſcontinued before: and therefore when C. died without iſſue, then did the diſcontinuance of the Eſtate tail of B. which paſſed by his livery ceaſe, and conſequently the entry of the iſſue of B. lawful. * Alſo note that a diſcontinuance made by the husband, did take away the entry only of the wife, and her heirs by the Common Law, and not of any other which claimed by title paramount above the diſcontinuance. As if lands had been given to the husband and wife and to a third perſon, and to their heirs, and the husband had made a feoffment in fee, this had been a diſcontinuance of the one moity, and a diſſeiſin of the other moity: if the husband had died. the ſurvivor ſhould have entred in the whole, for he claimed not under the diſcontinuance, but by title paramount, from the firſt feoffor, and ſeeing the right by law doth ſurvive, the Law doth give him a remedy to take advantage thereof by entry, for other remedy, for that moity he could not have.

Sect. 600. *Fo.* 328. *a.*

It is a Rule in Law, that the diſſeiſee, or any other that hath

hath a right only, by his releaſe, or confirmation, cannot make any diſcontinuance: becauſe nothing can paſs thereby, but that which may lawfully paſs. 9 *E.*4.18. 12 *E.*4.11. 5 *H.*4.8. 21 *H.*6.58.

By a feoffment the freehold doth paſs by open livery to the feoffee, and by a Releaſe, a bare right; *Sic nota diverſit.*

*Sect.*601,602,603. *Fo.*328. *b.* & 329. *a.*

A warranty being added to a releaſe, or confirmation, and deſcending upon him that right hath to the lands maketh a diſcontinuance, otherwiſe it is out of the reaſon of the Law, and worketh no diſcontinuance, if the warranty diſcend upon another.

If Tenant in tail releaſe to his diſſeiſor, and bind him and his heirs to warranty, this is a diſcontinuance. For if the iſſue in tail ſhould enter in this caſe, the warranty (which is ſo much favourod in Law) ſhould be deſtroyed: and therefore to the end, that if Aſſets in fee-ſimple do deſcend, he to whom the releaſe is made, may plead the ſame; and bar the demandant, by which means all rights and advantages are ſaved.

*Sect.*604.

When a Biſhop, &c. make an Eſtate, Leaſe, Grant, or Rent-charge, Warranty, or any other act, which may tend to the diminution of the Revenues of the Biſhoprick, &c. which ſhould maintain a Succeſſor, there the privation, or tranſlation of the Biſhop, &c. is all one with his death. But where the Biſhop is Patron and Ordinary, and confirmeth a Leaſe made by the Parſon, without the Dean and Chapter; and after the Parſon dieth, and the Biſhop collateth another, and then is tranſlated, yet his confirmation remaineth good; for the revenues that are to maintain the ſucceſſor, are not thereby diminiſhed; and ſo it is in caſe of reſignation. 29 *E.*3.16 *ibid. garr.* 99. *cl. contr.*

Sect.

*Vide Sect.*608,609,610,611,612,613.*Fo.*330,331.*a.*

Tiels choſes queux paſſant en aſc' caſes de tenant en le taile enſolement per voy de grant, ou per confirmation, ou per releſe rien poit paſſe pur faire eſtate a celuy, a que tiel grant, confirmation ou releaſe eſt fait, forſque ceo que le ten' en tail ent droiturelment fair,& ceo neſt forſque pur terme de la vie, &c.

Hereby it appeareth that a feoffment in fee (albeit it be by parol) is of greater operation and eſtimation in Law, than a grant of a reverſion by Deed, though it be inrolled, and Attornment of the leſſee for years of a releaſe, or a confirmation by Deed.

Alſo having regard to the iſſue in tail, and to them in reverſion or remainder, Tenant in tail cannot lawfully make a greater eſtate than for term of his life. But in regard of himſelf a releaſe or grant made by him, leaveth no reverſion in him, but put the ſame in Abeiance, ſo as after ſuch releaſe or grant made, he ſhall not have any action of waſte; and he ſhall not enter for a forfeiture,&c. 13*H.*10.*a.Br.Releaſe* 95

Sect. 614. *Fo.*331.*b.*

The Feoffee of Tenant in tail hath no rightful eſtate, having reſpect to two perſons, the one is the donor, whoſe reverſion is diveſted and diſplaced, and the other is to the iſſue in tail, who is driven to his action to recover his right.

Deforciare, ſignifieth, to withhold Lands or Tenements from the right owner, in which caſe either the entry of the right owner is taken away, or the deforceor holdeth it ſo faſt, as the right owner is driven to his real *Præcipe*, wherein it is ſaid, unde A. *eum juſte deforceat*, or the deforceor ſo diſturbeth the right owner, as he cannot enjoy his own. *Bract.l.*4. *fo.*238. *Fleta l.*5.*ca.*11.

There is a Writ called a *Quod ei deforc'* and lieth where Tenant in tail, or tenant for life, loſeth by default, by the Statute he ſhall have a *Quod ei deforc'* againſt the recoveror, and

and yet he cometh in by courſe of Law. *Weſtm.2. cap.4.*

Sect.615,616,617,618. Fo.332. a.b.

An Advowſon is a thing that lieth in grant, and paſſeth not by livery of ſeiſin. *5 E.3.58. 21 E.3.37,38. 43E.3.1b. 11H.6.4.5H.7.37.18H.8.16El.Dy.323.b.*

If a remainder, a rent-ſervice, or a rent-charge, or an Advowſon, or a common, or any other inheritance that lieth in grant, be granted by Tenant in tail, it is no diſcontinuance. *Bract.l.2.f.3.& f.266.318.Brit.fo.187.Mir.ca.2.S.17. Flat.3. c.15.*

For that it is a maxim in Law, That a grant by Deed of ſuch things as do lie in grant, and not in livery of ſeiſin, do work no diſcontinuance. But the particular reaſon is, for that of ſuch things the grant of Tenant in tail worketh no wrong, either to the iſſue in tail, or to him in reverſion, or remainder; for nothing doth paſs, but only during the life of Tenant in tail, which is lawful, and every diſcontinuance worketh a wrong. *6E.3.56. 4H.7.17. 21H.7.42. 21H.6.52,53. 5E.43. 21E.4.5.22R.2.Diſcontinuance 35.Br. 19E.3.Br.468. Pl.Com. 435.18Aſſ.p.2.*

If a Tenant in tail of a rent-ſervice, &c. or of a reverſion, or remainder in tail, &c. grant the ſame in fee with warranty, and leaveth aſſets in fee-ſimple and dieth, this is neither bar, nor diſcontinuance to the iſſue in tail, but he may diſtrain for the rent or ſervice, or enter into the Land, after the deceaſe of Tenant for life. But if the iſſue bringeth a Formedon in the diſcender, and admitting himſelf out of poſſeſſion, then he ſhall be barred by the Warranty, and Aſſets. *33E.3.Form.47. 13H.7.10.36Aſſ.8.4H.7.17.*

Tenant in tail of a rent diſſeiſeth the Tenant of the Land, and makes a feoffment in fee with warranty and dieth, this is no diſcontinuance of the rent. *3H.7.12.9E.4.22.*

And where the thing doth lie in livery, as Lands and Tenements, yet if to the conveyance of the freehold, or inheritance, no livery of ſeiſin is requiſite, it worketh no diſcontinuance.

As if Tenant in Tail exchange Lands, &c. or if the King being Tenant in Tail, grant by his Letters Patents the Lands in fee, there is no diſcontinuance wrought. 38. *H.*8. *Pat.Br.* 10.*Pl.Com.*233.*l.*1.*f.*26. *Altonwoods* caſe.

Of a thing that lieth in grant, though it be granted by Fine, yet it is no diſcontinuance, and this is Regularly true, 4[a] *E.*3.23.

If Tenant in tail make a Leaſe for years of Lands, and after levy a Fine, this is a diſcontinuance; for a Fine is Feoffment of Record, and the freehold paſſeth. 15 *E.*4. Diſcontinuance, 30.

But if Tenant in tail make a Leaſe for his own life, and after levy a Fine, this is no diſcontinuance, becauſe the reverſion expectant upon a Statute of freehold, which lyeth only in grant, paſſeth thereby. 6. *H.*8.56,57.

Sect. 620.

Si Tenant in tail fait Leaſe a Terme de vie le leſſee,&c. & apres tenant in taile grant per ſon fait le reverſion in fee a un auter, & le tenant a terme de vie attorne, & mor. vivant le Tenant in taile, & le grantee del reverſion enter,&c.en la vie le Tenant in tail, donque ceo eſt un diſcontinuance en fee. For when the reverſion in this caſe is executed in the life of Tenant in tail, it is equivalent in judgment of Law to a Feoffment in Fee; for the ſtate for life paſſed by livery. 32.*E.*3.Diſcontinuance 2. 3 *H.*4.9.34. *Aſſ.*6. *p.*4.38.*Aſſ.*6.*p.*6.

But if the Tenant in tail make a Leaſe for Term of the life of the Leſſee, &c. and grant over the reverſion and dyeth, and after the death of Tenant in tail, the leſſee dye, the entry of the iſſue is lawful, becauſe by the death of the Leſſee, the diſcontinuance is determined, and conſequently the grant made of the reverſion, gained upon that Diſcontinuance, is void alſo.

If Tenant in tail make a Leaſe for life, the remainder in fee, this is an abſolute diſcontinuance, albeit the remainder be not executed in the life of Tenant in tail, becauſe all is one eſtate and paſſeth by livery; and ſo note a diverſity between

tween a grant of a reverſion, and a limitation of a remainder. 21 H.6.52;53.

B. Tenant in Tail makes a gift in Tail to A. and after releaſes to A. and his heirs, and after A. dyeth without iſſue the iſſue of the firſt Donee may enter upon the collateral heir, becauſe A. had not ſeiſin, and execution upon the reverſion of the land in the demeſn as of fee.

But if Tenant in Tail make a leaſe for the life of the leſſee, and after releaſe to him and his heirs, this is an abſolute diſcontinuance, becauſe the fee ſimple is executed in the life of Tenant in Tail.

If Tenant in Tail of a Manor whereunto an Advowſon is appendant, make a feoffment in fee by Deed of one acre with the Advowſon, and the Church becometh void, and the feoffee preſent, Tenant in Tayl dyeth, the Church becometh void, the iſſue ſhall not preſent until he hath recontinued the acre. But if the feoffee had not executed the ſame by Preſentment, then the iſſue in Tail ſhould have preſented. And ſo was it at the Common Law, of the husband ſeiſed in the right of his wife *Mutatis mutandis*, 34 E. *Qu. imp.* 179. 22 E. 3.6. 17 E. 3. 3.33 E. 3. *Qu imp.* 19 23 *Aſſ.* 8.

If the husband and wife make a leaſe for life by Deed of the wives land, reſerving a rent, the husband dyeth, this was a Diſcontinuance at the Common Law for life, and yet the reverſion was not diſcontinued, but remained in the wife otherwiſe it is as if the husband had made the leaſe alone. 38 E.3.32.18 *Aſſ.*2.18 E.3.54.22 H.6.24.

If Tenant in Tail make a leaſe for life of the leſſee, and after grant the reverſion with Warranty, and dyeth before execution, this is no diſcontinuance, becauſe the diſcontinuance was but for life, and the Warranty cannot enlarge the ſame. *Bro. Diſcontinuance* 3.21 H.7.11.l.1.fo.85.l.10.fo.96. 97.

If Tenant in Tail make a Leaſe for life, and grant the reverſion in fee, and the leſſee attorn, and that grantee grant it over, and the leſſee attorn, and then the leſſee for life dy-

eth, ſo as the reverſion is executed in the life of Tenant in Tail, yet this is no Diſcontinuance, becauſe he is not in of the grant of the Tenant in tail, but of his grantee, 15*E.*4.*Diſcent* 30. *Vide Sect.*642.*fol.*333.*b.*

If Tenant in tail make a leaſe for life, and after diſſeiſeth the leſſee for life, and maketh a feoffment in fee, the leſſee dieth, and then Tenant in tail dieth, albeit the fee be executed, yet for that the fee was not executed by lawful means, it is no Diſcontinuance.

*Sect.*625.*Fol.*335.*a.*

Littleton here putteth his caſe of a reverſion immediately expectant upon the gift in tail. Alſo it is to be intended of a feoffment made to the donor ſolely or only, for if the donee infeoff the donor, and a ſtranger, this is a Diſcontinuance of the whole land, 41*Aſſ.*2.41*E.*3.2.28*H.*8.*Dyer* 12.*lib.*1.*fo.*140. in *Chudleys* caſe, 9*E.*4.24.*b.*

But if Tenant for life make a leaſe for his own life to the leſſor, the remainder to the leſſor and eſtranger in fee; in this caſe foraſmuch as the limitation of the fee ſhould work the wrong it enureth to the leſſor as a ſurrender for the one moity, and a forfeiture as to the remainder of the ſtranger. *Nul poit diſcont' leſtate en tail, ſi non que il diſcont' le reverſion, &c. ou le remainder, &c.* 40*Aſſ.*36. 61*Aſſ.*36. 18*E.*3.45. *F.N.B.*142.*a.Pl.Com.*555.

And therefore if the reverſion or remainder be in the King, the Tenant in tail cannot diſcontinue the eſtate Tail. But Tenant in tail, the reverſion in the King, might have barred the eſtate Tail by a Common recovery, until the Statute of 33*H.*8. *cap.*20. which reſtraineth ſuch a Tenant in tail, but that Common Recovery never barred, nor diſcontinued the Kings reverſion. 33*H.*8.*Tail Br.*41.

If a feme covert be Tenant for life, and the husband make a Feoffment in fee, and the leſſor enter for the forfeiture, here is the reverſion reveſted, and yet the Diſcontinuance remained at the Common Law. 27*Aſſ.p.*60. 29*Aſſ.*43. 11*Aſſ.*11. 16*Aſſ.* 11. 18*E.*3.45.

Sect.

*Sect.*632. *fol.*336.*b.*

Si le baron soit seisie de cert' terre en droit sa feme, & fait feoffment in fee sur condition & devie, &c. When the heir in this case hath entred for the Condition broken, and hath avoided the feoffment, the estate of the heir vanisheth away, and presently the estate vesteth in the feme or her heirs, without any entry or Claim by her or them: for the heir enters in respect of the Condition upon the real Contract, and not of any right; and if the husband himself had re-entred, the state had vested in his Wife. And therefore where *Littleton* and our Books say, That the wife shall enter upon the heir, the meaning is, That after the re-entry of the heir, she may enter. 4*H.*6.2.9*H.*7.24.*b.l.*8.*f.*43,44.*Whittinghams* Case.

*Sect.*633. *Fo.*337.*b.*

If the husband within age take a wife feme Tenant in tail general, and the husband make a gift in tail, and dieth within age, in this case the wife may enter, as *Littleton* here holdeth; or the heir of the husband, in respect of the new reversion descended unto him, may enter. But if the heir enter, presently thereupon his estate vanisheth.

If husband and wife be both within age, and they by deed indented joyn in a Feoffment, reserving a rent, the husband dieth, the wife may enter, or have a *Dum fuit infra ætat'*. But if she were of full age she shall not have *Dum fuit infra ætat.* for the Nonage of her husband, albeit they be but one person in Law. 14*E.*3.*Breve* 282.14*E.*3.*Dum fuit, &c.*6.*F.N. B.*892.

*Sect.*634.

2. *Joyntenants esteant deins age, font un feoffment in fee, & lun de les infants devy, celuy que survesquist, poit enter en lent', &c.* For that they may joyn in a writ of Right, and therefore the Right shall survive. But they cannot joyn in a *Dum fuit infra ætat'*, because the Nonage of the one, is not the Nonage of

of the other, 21 *E.* 3. 50. 18 *E.* 2. *Breve* 831. 6 *E.* 3. 4. 9 *H.* 6. 6. 19 *H.* 6. 6. 39 *H.* 6. 42. 34 *H.* 6. 31.

In this caſe if one Joyntenant had made a Feoffment in fee and died, the right ſhould not have ſurvived, for the Joynture was ſevered for a time.

If two Joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the Infant ſhall enter, or have a *Dum fuit, &c.* but for the moity.

Sect. 635. *Fo.* 337. *b.*

Serroit encounter reaſon, que un feoffment fait per celuy que ne fuit able de faire tiel feoffment grievera, ou ledera auter, de toller eux de lour entre, &c. Meliorem facere poteſt minor conditionem deteriorem nequaquam, Bract. fo. 14. Brit. f. 88. a.

Nota, A ſpecial heir ſhall take advantage of the infancy of the Anceſtor. As if Tenant in tail of an acre of the Cuſtom of Borough Engliſh, make a Feoffment in fee within age, and dieth, the youngeſt Son ſhall avoid it, for he is privy in blood, and claimeth by Diſcent from the Infant.

And ſo note, that a cauſe to enter by reaſon of infancy, is not like to Conditions, Warranty, and Eſtoppels, which ever deſcend to the heir at the Common Law.

Sect. 636. *Fo.* 338. *a.*

Note, there be 3 kinds of Surrender, *viz.* a Surrender properly taken at the Common Law, which is a yielding up of an eſtate for life or years to him that hath an immediate eſtate in reverſion or remainder, wherein the eſtate for life or years may drown by mutual agreement between them. 2. A Surrender by Cuſtom of Lands holden by Copy, or of Cuſtomary eſtate, *vide Sect.* 74. *homo com. gen.* * * And 3. A Surrender improperly taken (*vide S.* 550.) of a Deed. And ſo of a Surrender of a Patent, and of a rent newly created, and of a fee-ſimple to the King. 2 *El. Dy.* 176. 14 *H* 7. 3. 27 *Aſſ.* 37. 49 *E.* 3. 2. 11 *H.* 4. 2. 12 *H.* 4. 21. 13 *H.* 4. 13.

And a Surrender properly taken, is of two ſorts, *viz.* 1. A ſurrender in Deed, by expreſs words, whereof *Littleton* here putteth an Example; and he putteth his caſe of a Surrender of an eſtate in poſſeſſion, for a right cannot be ſurrendred. 2. A ſurrender in Law, which in ſome caſes is of greater force, then a Surrender in Deed.

As if a man make a leaſe for years to begin at Michaelmas next, this future intereſt cannot be ſurrendred, becauſe there is no reverſion wherein it may drown, but by a ſurrender in Law it may be drowned.

As if the Leſſee before Michaelmas take a new leaſe for years, either to begin preſently or at Michaelmas, this is a ſurrender in Law of the former leaſe. *Fortior, et æquior eſt diſpoſitio legis quam hominis* 14 *H.*8.15.50 *E.*3.6. 44 *Aſſ.*3. 35 *H.*8. *Dyer.*37.8. *Aſſ.*20.4 *M.Dyer* 141.11 *El.Dyer.*280.21 *H.*7.6.14 *H.*7.4. *li.*6 *fo.*69. Sir *Moyl Finches* Caſe.

Alſo there is a Surrender without Deed, whereof *Littleton* putteth here an Example of an eſtate for life of lands. And alſo there is a Surrender by Deed, and that is of things that lie in grant, 16 *H.*6.33.27 *Aſſ.*46.14 *H.*7.4.1 *H.*6.1 *Pl.Com.* 541.

And albeit a particular eſtate be made of lands by Deed, yet may it be ſurrendred without Deed, in reſpect of the nature and quality of the thing demiſed, becauſe the particular might have been made without Deed. And ſo on the other ſide.

If a man be * Tenant by the Courteſie, or Tenant in Dower of an Advowſon, Rent, or other thing that lies in grant, albeit the eſtate begin without Deed, yet in reſpect of the nature and quality of the thing that lies in grant, it cannot be ſurrendred without Deed. And ſo if a leaſe for life be made of lands, the remainder for life, albeit the remainder for life began without Deed, yet becauſe remainders and reverſions, though they be of lands, are things that lie in grant, they cannot be ſurrendred without Deed. *Qu. ſi le fits la feme poiet enter*; &c.

It is holden of ſome, That after the ſurrender, the iſſue in Tail

Tail during the life of Tenant for life may enter, for that having regard to the iſſue, the ſtate for life is drowned, and conſequently the inheritance gained by the leaſe, is by the acceptance of the ſurrender vaniſhed and gone; as if Tenant in Tail make a leaſe for life, whereby he gaineth a new reverſion, if Tenant for life ſurrender to the Tenant in Tail. the eſtate for life being drowned, the reverſion gained by wrong is vaniſhed, &c. and he is Tenant in Tail again againſt the opinion *Obiter* of *Fortington*, 21 *H.6.53. vide lib. fo.* 338. *b. Mes il neſt rien a faire, pur ceo que tout le matter eſt icy tranſcribe verbatim.*

But herein are two diverſities (Notable) The firſt is that having regard to the parties to the ſurrender, the eſtate is abſolutely drowned, as in this caſe between the leſſee and the ſecond Baron. But having regard to ſtrangers, who were not parties or privies thereunto, leſt by a voluntary ſurrender they may receive prejudice, touching any right or intereſt they had before the ſurrender, the eſtate ſurrendred hath in conſideration of Law a Continuance.

As if a reverſion be granted with Warranty, and Tenant for life ſurrender, the grantee ſhall not have execution in value againſt the grantor, who is a ſtranger, during the life of Tenant for life; for this ſurrender ſhall work no prejudice to the grantee, who is a ſtranger, 45 *E.*3.13.5 *H.*5. 9. 9 *E.*4.18.

So if Tenant for life ſurrender to him in reverſion, being within age, he ſhall not have his age, for that ſhould be a prejudice to a ſtranger, who is become Demandant in a real action, 40 *E.*3.13. 1 *H.*6.1. 24 *E.*3.77.

If Tenant for life grant a rent charge, and after ſurrender, yet the rent remaineth; for to that purpoſe he cometh in under the Charge, 5 *H.*5.8. 26. *Aſſ.*38. 7 *H.* 6. 1 *b.*

If a Biſhop be ſeiſed of a rent charge in fee, the Tenant of the land inſeoff the Biſhop and his ſucceſſors, the Lord enter for the Mortmain, he ſhall hold it diſcharged of the rent, for the entry for the Mortmain affirmeth the alienation

in Mortmain, and the Lord claimeth under his eſtate; but if Tenant for life grant a rent in fee, and after infeoff the grantee, and the leſſor enter for the forfeiture, the rent is revived, for the leſſor doth claim above the Feoffment. But if I grant the reverſion of my Tenant for life to another for term of his life, and Tenant for life attorn, now is the waſte of Tenant for life diſhpuniſhable, 48 *E.* 3. 16.

Afterwards I releaſe to the grantee for life and his heirs, or grant the reverſion to him and his heirs, now albeit the Tenant for life be a ſtranger to it, yet becauſe he attorneth to the grantee for life, the eſtate for life which the grantee had, ſhall have no continuance in the eye of Law as to him, but he ſhall be puniſhed for Waſte done afterwards.

The ſecond diverſity is, That for the benefit of an eſtranger, the eſtate for life is abſolutely determined.

As if he in the reverſion make a leaſe for years, or grant a rent-charge, &c. and then the leſſee for life ſurrender, the leaſe or rent ſhall commence preſently

So in the caſe of *Littleton*, firſt between the leſſee, and the ſecond husband, the ſtate for life is determined. And 2. for the benefit of the iſſue it ſhall be ſo adjudged in Law. Here note a diverſity when it is to the prejudice of a ſtranger, and when it is for his benefit.

If a man make a leaſe to *A.* for life, reſerving a rent of 40 *s.* to him and his heirs, the remainder to *B.* for life, the leſſor grant the reverſion in fee to *B.* *A.* attorneth, *B.* ſhall not have the rent, for that although the fee-ſimple do drown the remainder for life between them, yet as to a ſtranger it is in *eſſe*, and therefore *B.* ſhall not have the rent, but his heir ſhall have it.

A Maſter of an Hoſpital being a ſole Corporation, by the conſent of his Brethren makes a leaſe for years of part of the poſſeſſion of the Hoſpital; afterwards the leſſee for years is made Maſter, the term is drowned, for a man cannot have a term for years in his own right, and a Freehold *en auter droit*, to conſiſt together (as if a man leſſee for years take a feme leſſor to wife.) But a man may have a Freehold in

in his own right, and a term *en auter droit*; and therefore if a man leſſor take the feme leſſee to wife, the term is not drowned, but he is poſſeſſed of the term in her right during the Coverture. 6*H.*4.7.*Pl.Com.*419.

So if the leſſee make the leſſor his Executor, the term is not drowned. 32*H.*8.*Br.Surr.*52.

But if it had been a Corporation aggregate of many, the making of the leſſee Maſter had not extinguiſhed the term, no more than if the leſſee had been made one of the Brethren of the Hoſpital.

*Sect.*637. *Fo.*339.*a.*

Nota que un eſtate tail ne poit eſte diſcont', mes la ou ceſtuy que fait diſcont' fuit un foits ſeiſee (quia, omnis privatio præſupponit habitum) per force de la tail, ſinon que ſoit per reaſon de garranty, &c. for in many caſes a Warranty added to a Conveyance, is ſaid to make a Diſcontinuance, *ab effectu*, becauſe it taketh away the entry of him that right hath, as a Diſcontinuance doth.

As if Tenant in tail be diſſeiſed, and dieth, the iſſue in tail releaſeth to the diſſeiſor with Warranty, &c. 9*E.*4.19. 12*E.*4. 11.21*E.*4.97. *Vide Sect.*592,596,597,601,640,658.

*Sect.*642. *Fo.*340.*b.*

Albeit the reverſion in this caſe be executed in the Lord by the Eſcheat in the life of Tenant in tail, yet becauſe he is not in by the Tenant in Tail, but by Eſcheat, it worketh no diſcontinuance. But if it had been executed in the life of Tenant in tail, in the grantee, which was in by Tenant in tail, then the Lord by Eſcheat ſhould have taken advantage by it. *Vide Sect.*620.*lib.*1.*fo.*136.*& lib.*2.*fo.*62,63.

*Sect.*643,644,*&* 645.

In whom the fee-ſimple of the Gleab, &c. is, is a queſtion

in our Books: Some hold that it is in the Patron, 8*H.*6.24. 12*H.*8.8. But that cannot be for two Reaſons.

1. For that in the beginning the Land was given to the Parſon and his ſucceſſors and the Patron is no ſucceſſor.

2. The words of the Writ of *Juris utrum*, be, *Si ſit liberæ Eleemoſynæ Eccleſiæ de* D. and not of the Patron, *Reg.*307.*a.* 45*E.*3.*Eſchang.*12*H.*8,9.

Some others do hold, That the fee-ſimple is in the Parſon and Ordinary, *F.N.B.*19.*I.* But this cannot be for the cauſes aboveſaid; and therefore of neceſſity the fee-ſimple is in abeiance, as *Littleton* ſaith.

Upon conſideration of all our Books, I obſerve this diverſity, That a Parſon or Vicar for the benefit of the Church, and of his ſucceſſor, is in ſome caſes eſteemed in Law to have a fee-ſimple qualified, but to do any thing to the prejudice of ſucceſſors in many caſes, the Law adjudgeth him to have in effect but an eſtate for life. *Cauſæ Eccleſiæ publicis cauſis æquiparantur, & ſumma ratio eſt quæ pro religione facit,* Bract. lib.3. f.226. *Et Eccleſia fungitur vice minoris, meliorem facere poteſt condit' ſuam, deter' nequaquam,* Brit.f.143.

As a Parſon, Vicar, Archdeacon, Prebend, Chantry Prieſt, &c. may have an action of Waſte; and in the Writ it ſhall be ſaid, *Ad exhæreditationem Eccleſiæ, &c. ipſius* B. or *Præbendæ ipſius* A. *F.N.B.*55.*d.*& 57*E.*2.10*H.*7.5.

And the Parſon, &c. that maketh a leaſe for life, ſhall have a *Conſimili caſu* during the life of the leſſee, and a Writ of Entry *ad Com. legem* after his death, or a Writ *ad terminum qui præteriit*, or a *quod permittat* in the *debet*, and none can maintain any of theſe Writs but a Tenant in fee-ſimple or fee-tail, *F.N.B.l.m.n.* 20*H.*3.*Jur.utr.Temps E.*3. *Jur. utr.* 141. 14*E.*3. *ibid.*4. *F. N. B.* 50. 30*E.*3. 26. 21*E.*3.11.*Entry* 10. *F. N. B.* 206. *fol. Reg.* 237. 4*E.*4,2. 8 *E.*3. *Entry* 3.7*E.*3.54. 55.

And a Parſon, &c. may receive Homage, which Tenant for life cannot do, *Temps E.*1. *Encumbent* 19.

Item, a Parſon &c. ſhall have a writ of Meſne, and a *Contra formam feoffamenti*, *F.N.B.*49.*l.*50.*a.fo.*341.*b.*

But

But a Parſon cannot make a diſcontinuance, for that ſhould be to the prejudice of his ſucceſſors to take away his entry, and to drive him to a reall action. Alſo if a parſon, &c. make a Leaſe for years, reſerving a rent and dieth, the Leaſe is determined by his death as if Tenant for life had made a Leaſe, no acceptance of the rent by the ſucceſſor can make it good. Alſo in a real action, a Parſon, Vicar, Archdeacon, &c. ſhall have aid of the Patron, and ordinary, as Tenant for life ſhall have. 20*E.*3, Aid. 30. 25*E.*3. 54. 8 *E.*3. 45. 8 *H.*6. 24. 11 *H.*6. 9. 6*E.*3. 45. 43. *Aſſ, p.* 13 *F.N.B.* 129.

So as it evident, that to many purpoſes a parſon hath but in effect an Eſtate for life, and to many a qualified fee ſimple; but the entire fee and right is not in him, and that is the reaſon that he cannot diſcontinue the fee ſimple that he hath not, nor ever had; for as it hath been ſaid, *Omis privatio preſupponit habitum*, and for the ſame cauſe he cannot have a writ of right, nor a writ of right in his nature, as a writ of right for diſclaimer of cuſtomes and ſervices, *ne injuſtè vexes, rationalibus diviſis, quo jure, &c.*

But here it appeareth by *Littleton*, that ſuch bodies politick or corporate as have a ſole ſeiſin, and may have a writ of right for that the fee and right is in them (albeit they cannot abſolutely convey away their Lands, &c. without aſſent of others) may make a diſcontinuance, as a Biſhop, an Abbot, a Dean, a Maſter of an Hoſpital, &c. But this is to be underſtood, where a Dean, &c. are ſolely ſeiſed of diſtinct poſſeſſions, for if the body that is ſeiſed be aggregate of many, as the Dean and Chapter, Maſter and confreres, &c. then the Feoffment of the Dean or Maſter is ſo far from a diſcontinuance, as it is a diſſeiſin.

But at this day, the Biſhop, Dean, Maſter of an Hoſpital, &c. that have the fee and right in them, cannot diſcontinue, neither can they, or any Parſon, Vicar, Arch-Deacon, Prebendary, or any other having any Eccleſiaſtical living with aſſent of Dean and Chapter, Patron and Ordinary, or the conſent of ony others, make any Leaſe, gift, grant, or Conveyance, Eſtate, Charge or Incumbrance to bind his ſucceſ-

ſors or others, than for term of 21 years, or three lives in poſſeſſion, whereupon the accuſtomed rent or more ſhall be reſerved. *Vide S.* 528, 593, *&c.* 1 *El. c.* 18. 13 *El. c.* 10. 1 *Jac.* 3. *l.* 2. *fol.* 46. *l.* 4. *fol.* 76. *&* 20 *El.* 5. *fo* 9. *&* 14 *El.* 6. *fo.* 37. *l.* 7. *fo.* 8. *l.* 11. *fo.* 67. 27 *H.* 8. 31 *H.* 8. 32 *H.* 8. 37 *H.* 8. 1 *E.* 6. *&c.*

Theſe points concerning Hoſpitals were reſolved by the Juſtices, *P.* 24 *Eliz.* In *Ckeneys* caſe, *l.* 2. *fo.* 48, 49. *Eveſque de Cant.* caſe.

Firſt, That no Hoſpital was given to the Crown by the Statute of 27 *H.* 8. nor any Hoſpital is within the Statute of 31 *H.* 8. of Monaſteries, but only Religious and Eccleſiaſtical Hoſpitals, and that no Lay Hoſpital was within thoſe Statutes.

2. If upon the Foundation of any Hoſpital, or after it was ordained, That one or divers Prieſts ſhould be maintained within the Hoſpital, to celebrate Divine Service to the poor, and to pray for the Soul of the Founder, and all Chriſtian Souls, or the like, and that the poor of ſuch Hoſpitals ſhould make the like Oriſons; yet ſuch an Hoſpital is not within the ſaid Statute, for the Hoſpital is Lay and not Religious: and all, or the moſt part of ancient Lay Hoſpitals were founded or ordained after the like ſort, and the makers of thoſe Statutes never intended to overthrow works of Charity, but to take away the abuſe.

3. That no Hoſpital was given to the King by the Statute of 37 *H* 8. but in two caſes, where the Donors, Founders, or Patrons, &c. had entred and expulſed the Prieſts, Wardens, &c. between the 4. of *Febr.* 27 *H.* 8. and the 25. of *Decemb.* 37 *H.* 8. or where King *H.* 8. by Commiſſion according to that Act ſhould enter, and ſeiſe the ſame; but that determined by the death of that King, *l.* 1. *f.* 24. *Porters* Caſe.

4. That the Statute of 1 *E.* 6. extended not to any Hoſpital whatſoever, either Lay or Religious, as by the ſame appeareth, *l.* 4. 111, 113, 114, 116. in *Lamberts* caſe.

Nota, of Hoſpitals, ſome are Corporations aggregate of many,

many as of Maſter or Wardens &c. and his Confreres: ſome where the Maſter or Warden hath only the eſtate of Inheritance in him, and the Brethren and Siſters power to conſent, having Colledge and Common Seal; ſome where the Maſter or Warden hath the eſtate in him, but hath no Colledge and Common Seal, and ſuch a Maſter or Warden ſhall have a *juris utrum*; and of theſe Hoſpitals ſome be Eligible, ſome Donative, and ſome Preſentative, 14*E.*3. *Juris utrum* 4.

*Sect.*646,647. *Fo.*342. *b.*

If Tenant *pur terme d'auter vie* dieth, the Freehold is ſaid to be in abeyance until the occupant enter.

If a man make a leaſe for life, the remainder to the right heirs of *I. S.* the fee-ſimple is in abeyance until *I. S.* dieth. *Vide Sect.* 1. *Virg.* 4. Æn. *Inſequiturque ſolo, & caput inter nubila condit.*

Alſo when a Parſon dieth, we ſay, That the Freehold (of the Gleab, &c.) is *in conſideratione ſive intelligentia legis*, becauſe a ſucceſſor is in expectation to take it 24*E.*3.63.

So it is of a Biſhop, Abbot, Dean, Archdeacon, Prebend, Vicar, and of every other ſole Corporation, or Body Politick, Preſentative, Elective or Donative; which inheritances put in Abeyance, are by ſome called *Hæreditates jacentes*, *Bract. l.* 1. *c.*2. and ſome ſay, *Que le fee eſt en baiaunce*, *Brit. fo.*249.

*Sect.*641. *Fo.*343. *b.*

Principium eſt quaſi primum caput, from which many caſes have their original or beginning, which is ſo ſtrong, as it ſuffereth no contradiction. *Contra negantem principia non eſt diſputandum*, 11*H.*4.9.

Note a diverſity, when the right of the fee-ſimple is perpetually by Judgment of Law in Abeyance, without any expectation to come in *eſſe*, there he that hath the qualified fee, *Concurrent' his quæ in jure requiruntur*, may charge or alien it, as in the caſe of Parſon, Vicar, Prebend, &c.

But where the fee ſimple is in Abeyance, and by poſſibility may every hour come in *eſſe*; As if a leaſe for life be made, the remainder to the right heirs of *I. S.* the fee ſimple cannot be charged, till *I.S.* be dead.

Lands intailed may be charged in fee, for the eſtate Tail may be cut off by Fine or Recovery.

Alſo the eſtate Tail may continue, and yet Tenant in tail may lawfully charge the Land, and bind the iſſue in Tail, 44*E.*3.21,22.

As if a diſſeiſor make gift in Tail, and the Donee in conſideration of a Releaſe by the diſſeiſee of all his right to the Donee, grant a rent charge to the diſſeiſee and his heirs, proportionable to the value of his right, this ſhall bind the iſſue in Tail, *Vide* Sect. 1. *Bridgewaters* Caſe, &c. 59. *fol.* 4.8. b. Which Lands by the Rule of *Littleton* may be charged; and therefore if the owner of thoſe 13 acres grant a rent charge out of thoſe 13 acres, generally lying in the Meadow of eighty, without mentioning where they lie particularly, there as the eſtate in the land removes, the charge removes alſo,

If the Parſon die, and in time of Vacation, the Patron of the aſſent of the Ordinary, and the Patron and Ordinary grant an Annuity or rent charge out of the Gleab, this ſhall bind the ſucceeding Parſons for ever.

A Church Parochial may be Donative, and exempt from all Ordinary Juriſdiction, and the Incumbent may reſign to the Patron, and not to the Ordinary, neither can the Ordinary viſit, but the Patron by Commiſſioners to be appointed by him. And by *Littletons* Rule, The Patron and Incumbent may charge the Gleab, and albeit it be Donative by a Layman, yet *merè Laicus* is not capable of it, but an able Clerk *infra ſacros ordines* is; for albeit he come in by Lay Donation, and not by admiſſion, or inſtitution; yet his function is ſpiritual, *Vide* 133,535. 11 *E.*3. *Jur. atr.* 3.8. *Aſſ.* 29.31.13 *Aſſ.*2.

As the King may create Donatives exempt from the viſitation of the Ordinary, ſo he may by his Charter licenſe any Subject

Subject to found ſuch a Church or Chappel, and to ordain that it ſhall be Donative and not Preſentable, and to be viſited by the Founder, and not by the Ordinary. And thus began Donatives in *England*, whereof common perſons were Patrons. *F. N. B.* 35 *E.* 4. 2. A. B. *Dyer* 10 El. f. 273. 14 El. cap. 5. 2 *H.* 5. cap. 1.

Ordinarius, is he that hath ordinary Juriſdiction in cauſes Eccleſiaſtical, immediate to the King and his Courts of Common Law, for the better execution of Juſtice, as the Biſhop, *&c.* Regularly according to the Eccleſiaſtical Laws allowed by the Laws of this Realm, *viz.* which are not againſt the Common Law (whereof the Kings Prerogative is a principal part) nor againſt the Statutes and Cuſtoms of the Realm, the Ordinary and other Eccleſiaſtical Judges do proceed in Cauſes within their Conuſance; and this Juriſdiction was ſo bounded by the ancient Common Laws of the Realm, and ſo declared by Act of Parliament, 25 *H.* 8. *c.* 19. 33 *H.* 6. 34. 32 *H.* 6. 28.

Note, that inſtitution is a good plenarty againſt a Common perſon (but not againſt the King, unleſs he be inducted) and that is the cauſe that Regularly plenarty ſhall be tryed by the Biſhop, becauſe the Church is full by inſtitution, which is a ſpiritual act, but void or not void ſhall be tryed by the Common Law, 22 *H.* 6. 27. 38 *E.* 3. 4.

At the Common Law if an uſurpation had been had upon an Infant or feme Covert, having an Advowſon by diſcent, or upon Tenant for life, *&c.* the Infant, feme Covert, and he in the reverſion were driven to their Writ of Right of Advowſon; for at the Common Law if the Church were once full, the Incumbent could not be removed, and plenarty was a good plea in a *Qu. imp.* or Aſſize of Dar. Preſentment; and the reaſon of this was, to the intent that the Incumbent might quickly intend and apply himſelf to his ſpiritual charge: And ſecondly, the Law intended That the Biſhop that had Cure of Souls within his Dioceſſe, would admit and inſtitute an able man, *&c.* 6 *E.* 3. 28. 39. 52.

Nota,

If the King do preſent to a Church, and his Clerk is admitted and inſtituted, yet before induction, the King may repeal and revoke his Preſentation. But Regularly no man can be put out of poſſeſſion of his Advowſon, but by admiſſion and inſtitution upon an uſurpation by a Preſentation to the Church; *Cum aliquis jus præſentandi non habens præſentaverit, &c.* and not by collation of the Biſhop, 45 *E* 3.35. 38 *E.*3,4. 13 *El. Dyer* 292. 18 *El.Dyer* 348.14 *E.*4.2.7 *H.*4. 32. *fol.* 344. *b.*

Nota, that an uſurpation upon a preſentation, ſhall not only put out of poſſeſſion him that hath right of preſentation, but right of Collation alſo. Therefore at this day the Incumbent ſhall be removed by a *Qu. imp.* or Aſſize of Dar' preſentment, if there be not a plenarty by ſix months, before the Teſte of the Writ, but then the Incumbent muſt be named in the Writ, or elſe he ſhall never be removed, 9 *H.* 6. 32. & 56. 19 H. 6. 68.

At the Common Law if hanging the *Qu. imp.* againſt the Ordinary for refuſing of his Clerk, and before the Church were full, the Patron brought a *Qu. imp.* againſt the Biſhop, and hanging the Suit, the Biſhop admit and inſtitute a Clerk, at the preſentation of another, in this if Judgment be given for the Patron againſt the Biſhop, the Patron ſhall have a Writ to the Biſhop, and remove the Incumbent that came in *pendente lite* by uſurpation, for *pendente lite nihil innovetur*, and therefore at the common Law it was good policy, to bring the *Qu. imp.* againſt the Biſhop, as ſpeedily as might be. So it is good policy at this day to name the Biſhop in the *Qu. imp.* for then he ſhall not preſent by lapſe, 80 *E.*3. Qu imp. *Statim.* 5*E.*4.115. 9*E.*4.20.

*Sect.*649,650. *fol.* 345. *a.*

If Tenant in Tail of lands holden of the King, be attainted of Felony, and the King after Office ſeiſeth the ſame, the eſtate Tail in Abeyance, is there ſaid to be in ſuſpenſe, 19 *H.*6.60.24 *Aſſ.P.Com.*562.563. *Walſinghams* Caſe.

Tenant

Tenant for life, the remainder in tail, the remainder to the right heirs of Tenant for life, Tenant for life grant *totum Stat. ſuum* to a man and his heirs, both eſtates do paſs, 44 *Aſſ.* 28. 44 *E.* 3. 10.

Jus ſive rectum ſignifieth properly and ſpecially in Writs and Pleadings, when an eſtate is turned to a right, as by diſcent diſſeiſin &c. where it ſhall be ſaid, *Quod jus diſcendit, & non terra*, 20 *H.* 6. 9.

But right alſo doth include the eſtate *in eſſe* in Conveyances, and therefore if Tenant in fee-ſimple make a leaſe for years, and releaſe all his right in the land to the leſſee and his heirs the whole eſtate in fee-ſimple paſſeth. *Vide Sect* 465. *Pl.Com.* 484. *lib.* 8. *fol.* 153. *Althams* Caſe, 39 *H.* 6. 38.

And ſo commonly in Fines, the right of the Land includeth and paſſeth the ſtate of the land, as *A. cognovit tenementa prædicta eſſe jus ipſius* B &c. and the Statute ſaith, *Jus ſuum defendere* (which is) *ſtatum ſuum.* W. 2. cap. 3. *Pl.Com.* 484, & 487. *b.*

And note, that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus poſſidendi*, fo. 345. *b.*

Title properly is, when a man hath a lawful cauſe of entry into lands whereof another is ſeiſed for the which he can have no action, as Title of Condition, Title of Mortmain &c. *Vide* S. 429, 659. &c.

Every right is a Title, but every Title is not ſuch a right, for which an action lieth, and therefore *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt.*

As by a releaſe of a right a Title is releaſed, ſo by releaſe of a Title a right is releaſed alſo.

Intereſt, *ex vi termini*, extendeth to Eſtates, Rights and Titles that a man hath of, in, to, or out of Lands; and by the grant of *totum intereſſe ſuum* in ſuch lands, as well reverſions as poſſeſſions in fee-ſimple ſhall paſs, *Pl Com.* 374 Seignior *Zouches* Caſe & 487, 488. *Nich. Nichols* Caſe, 23 *H.* 8. *Tail, Br.* 32. 16 *El. Dy.* 325. *b.*

If Tenant for life be, the remainder in Tail, and he in the re-

remainder in tail releaſe to the Tenant for life all his right and ſtate in the land: Hereby it is ſaid in our Books, That the eſtate of the Leſſee is not enlarged, but the releaſe ſerveth to this purpoſe, to put the ſtate tail into Abeyance, ſo as after that he in the remainder cannot have an action of Waſte. 43 *Aſſ.p.*13.41*E.*3.*Waſte* 83.11*H.*4.67.14*H.*7.10.*Pl.Com.*482. *per Dyer* 27*H.*8.20. Yet in that caſe (ſaving reformation) the leſſee for life hath an eſtate for the life of Tenant in tail expectant upon his own life, 42*E.*3.23.

But if Tenant in fee releaſe to his Tenant for life all his right, yet he ſhall have an action of waſte; and if Tenant in tail make a leaſe for his own life, he ſhall have an action of Waſte, *F.N.B.*60.*H.*42*E.*3.18.41*E.*3.*Waſte* 83.

*Sect.*658.*Fol.*347.*b.*

Here *Littleton* doth add a Limitation to that which in this Chapter he had generally ſaid, *viz.* That an eſtate tail cannot be diſcontinued, but where he that maketh the diſcontinuance was once ſeiſed by force of the tail; which is to be underſtood, when he is ſeiſed of the Freehold and Inheritance of the eſtate in tail, and not where he is ſeiſed of a remainder, or a reverſion expectant upon a Freehold, which Freehold is ever much reſpected in Law. *Vide* 63-,592,596,597,601, 640,641.

CHAP.

CHAP. XII.

Of Remitter.

Sect. 659. *Fo.* 348. *a.*

LOu home ad 2 Titles a terres ou Tenements. Et adonques eſt adjudge eins per force de ſon eigne title, ceo eſt a luy dit un Remitter, pur ceo que ley luy mitter deſtre, eins en la terre, &c. per le plus eigne & ſure title. Quod prius eſt, verius eſt, & quod prius eſt tempore, potius eſt jure.

A Remitter is an operation in Law, upon the meeting of an ancient right remediable, and a latter ſtate in one perſon where there is no folly in him, whereby the ancient right is reſtored and ſet up again, and the new defeaſible eſtate ceaſed and vaniſhed away, 25 *Aſſ. p.* 4. 11 *H.* 4. 50. *a.*

Here in this caſe (Titles) includeth Rights, for being properly taken as in caſe of a Condition, Mortmain, Aſſent to a Raviſher, &c. there is no Remitter wrought unto them, becauſe theſe are but bare Titles of Entry, for the which no action is given, but a Remitter muſt be to a precedent right. And *Littleton* in this Chapter putteth all his caſes only of Remitters to rights remediable. 429, & 650. *Sect. &c.* 34 *H.* 8. *Remit. Br.* 50. 44 *E.* 3. *Attaint* 22. 38 *Aſſ. p.* 7.

Note two things: 1. That this Remitter is wrought in this caſe by operation of Law upon the Freehold in Law deſcended without any entry.

2. That the Law ſo favoureth a Remitter, that if the diſcontinuee be an Infant, or feme Covert, and Tenant in Tail after a diſcontinuance diſſeiſe them, and die ſeiſed, the iſſue ſhall be remitted without any reſpect of the priviledge of Infancy or Coverture, 11 *E.* 4. 1.

In this caſe, and many other, the Law that abhorreth Suits

Suits of vexation, doth avoid circuity of action, for the Rule is *Circuitus eſt evitandus*, 11*E.*3.3. *Aſſ.*85. 4*E.*3.35. 14*H.*6.27. 10*H.*7.11. *F.N.B. Meſne & Waſte.*

*Sect.*660. *Fo.*384.*b.*

Since *Littleton* wrote, and after the Statute of 22*H* 8. c.10. If Tenant in tail make a Feoffment in fee to the uſe of his iſſue, being within age, and his heirs, and dieth, and the right of the eſtate Tail deſcend to the iſſue, being within age, yet he is not remitted, becauſe the ſtate executeth the poſſeſſion in ſuch plight, manner and form as the uſe was limited; *& ſic de ſimilibus*, 35*H.*8. *Dyer* 54.*b.* 6*E.*6.*ib.*77.1 *&* 2 *P.M.* 116. 1 *&* 2 *P.M.* 129. 191. 28*H.*8.23.*b. Pl. Com. Amy Townſends* Caſe, 34*H.*8. *Remit. Br.*49.

But if the iſſue in Tail in that caſe wave the poſſeſſion, and bring a Formedon in the Diſcend. and recover againſt the feoffees, he ſhall thereby be remitted to the eſtate Tail, otherwiſe the lands may be ſo incumbred, as the iſſue in Tail ſhould be at a great inconvenience: but if no Formedon be brought; if that iſſue dieth, his iſſue ſhall be remitted, becauſe a ſtate in fee ſimple at the Common Law deſcendeth unto him, *Pl. Com. ſupra.*

Nota in this caſe, that the Statute of the land, out of which the rent iſſued, being defeated, the rent is defeated alſo. *Fo.* 349.*a.*

But if Tenant in Tail make a Leaſe for life, whereby he gaineth a new reverſion in fee, ſo long as the Tenant for life liveth, and he granted a rent-charge, out of the reverſion, and after Tenant for life dieth, whereby the grantor becometh Tenant in Tail again, and the reverſion in fee defeated, yet Becauſe the grantor had a right of the intail in him, cloathed with a defeaſible fee ſimple, the rent charge remaineth good againſt him, but not againſt his iſſue which diverſity is obſervable, 11 *H.*7.21. *Edriches* caſe.

If the heir apparent of the diſſeiſee diſſeiſe the diſſeiſor, and grant a rent charge, and the diſſeiſee dieth, the grantee ſhall hold it diſcharged, for there a new right of Entry doth

doth deſcend unto him, and therfore he is remitted.

So if the Father diſſeiſe the grandfather; and grant a rent charge and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth, the Son is remitted. So as where our author putteth his example of a fee tail, it holdeth alſo in caſe of fee ſimple, and *Littleton, que la terre eſt diſcharge del rent,* &c. But the whole grant is not thereby avoided, for the grantee ſhall have notwithſtanding a writ of annuity, and charge the perſon of the grantor, *Lib.2.fo.* 36.b. *Wards* caſe.

Alſo *Littleton* here puts his caſe of things granted out of the Land. But if the iſſue at full age by Deed Indented, or Deed Poll make a Leaſe for years of the land, and after by the death of Tenant in Tail, he is remitted: It is holden that he ſhould not avoid the Leaſe, becauſe it is made of the Land it ſelf; and the Land is become by the Leaſe in another plight, then it is in the caſe of a grant of a rent charge. 33 *H.*8. *Dy.* 51.*b.* and *vide Sect.*289.*

*Sect.*661. *Fo.*349.*b.*

Regularly, a man ſhall not be remitted to a right remedileſs, for the which he can have no action, *l.*3. *f.*3. Marqueſs of *Wincheſters* caſe. Neither an Action without a right, nor a right without an action, can make a remittance. As if Tenant in Tail ſuffer a common recovery, in which there is errour, and after Tenant in tail diſſeiſe the recoveror, and dieth, here the iſſue in tail hath an action, *viz.* a writ of errour, but as long as the Recovery remaineth in force, he hath no right, and therefore in that caſe there is no remittance. If B. purchaſe an Advowſon, and ſuffer an uſurpation and ſix months to paſs, and after the uſurper grant the Advowſon to B. and his heirs, B. dieth, his heir is not remitted, becauſe his right to the Advowſon was remedileſs, a right without an action. Tenant in tail of a Manor whereunto an Advowſon is appendant maketh a diſcontinuance, the diſcontinuee grants the Advowſon to Tenant in tail and his heirs, Tenant in tail dieth, the iſſue is not remitted to the Advowſon

vowſon, becauſe the iſſue had no action to recover the Advowſon, before he recovered the Manor, whereunto the Advowſon was Appendant, 5 *H.*7.35. And ſo it is of all other inheritances, regardant, appendant or appurtenant, a man ſhall be remitted to any of them before he recontinueth the Manor, &c. whereunto they are regardant, appendant, &c.

Car nul ne poie claimer droit en les appurtenances ne en les acceſſories que nul droit ad en le principal, Brit.*fo.*126.

But on the other ſide, if a man be remitted to the principal, he ſhall alſo be remitted to the appendant or acceſſary, albeit it were ſevered by the diſcontinuee, or other wrong doer; and therefore if Tenant in tail be of a Manor, whereunto an Advowſon is appendant, and infeoffeth *A.* of the Manor with the appurtenances, *A.* re-enfeoffeth the Tenant in tail, ſaving to himſelf the Advowſon, Tenant in tail dieth, his iſſue being remitted to the Manor, is conſequently remitted to the Advowſon, although at that time was ſevered from the Manor. So it is in the ſame caſe, if Tenant in tail had been diſſeiſed, and the diſſeiſor ſuffer an uſurpation, if the diſſeiſee enter into the Manor, he is alſo remitted to the Advowſon, 8*R.*2.*Qu. imp.*199.2*H.*4.18.14*H.*6.15,16. *F.N.B.*25.*b.* & 36. *f.* 33*H.*8.*Dy.*48.*b.*24*E.*3.*Diſcontinuance* 16.

*Sect.*663,664. *Fol.*350.

If the diſcontinuee, after the death of the Tenant in tail make a Charter of feoffment to the iſſue in tail being within age who hath right, and to a ſtranger in fee, and make livery to the infant in name of both: the iſſue is not remitted to the whole, but to the half, for firſt he taketh the fee-ſimple; and after the remittance is wrought by operation of Law, and therefore can remit him, but to a moity. *Vide Sect.*288.

Si Tenant in taile infeoffe ſon heire apparent, l'heire devant de plein age al'temps de feoffment, & puis le Ten' en tail mor', ceo neſt remitt'al heire, pur ceo que il fuit ſa folly, que il devant de plein age voile prender tiel feoffment, &c. By this feoffment albeit the heir apparent hath ſome benefit in the life of his An-

Anceſtor, yet is he thereby (beſides his own) ſubject during his life, to all charges and incumbrances made or ſuffered by his Anceſtors, 40 *E.*3.44.18.*E.*4.25.

Sect. 665. Fo. 351. *a.*

Nota, that the eſtate which doth in this caſe work the Remitter, could not have continuance after the deceaſe of the wife; and ſo on the other ſide, if the husband make a diſcontinuance and take back an eſtate to him and his wife, during the life of the husband, this is a Remitter to the wife preſently, albeit the eſtate is not by the limitation to have continued after the deceaſe of the husband; which caſe is provided by the reaſon of the caſe, which our Author here putteth.

If a man take to wife a woman ſeiſed in fee, he gaineth by the intermarriage an eſtate of freehold in her right, which eſtate is ſufficient to work a Remitter, and yet the eſtate which the husband gaineth dependeth upon uncertainty, and conſiſteth in privity. 13 *H.*4.6.18 *E.*4.5.11.*H.*7.19.10 *H.*6.11.7 *H.*6.9.*b.*

For if the wife be attainted of felony, the Lord by eſcheat ſhall enter, and put out the husband, otherwiſe it is if the Felony be committed after iſſue had, 4 *Aſſ.p.*4.4.*E.*3 *Aſſ.*166. *vide.S.*58.

Alſo if the husband be attainted of Felony the King gaineth no freehold, but a pernancy of the profits, during the Coverture, and the freehold remaineth in the wife.

2. If ſhe were poſſeſſed of a term for years, yet he is poſſeſſed in her right, but he hath power to diſpoſe thereof by grant or demiſe, and if he be utlawed or attainted, they are gifts in Law. *Pl.Com.*260.*b.Dame Hales* caſe.50.*Aſſ.*5.21*E.*4.35.7 *E.*4.6.7.*H.*7.2.

Upon an execution againſt the husband for his debt, the Sheriff may ſell the term during her life; but the husband can make no diſpoſition thereof by his laſt Will. Alſo if he make no diſpoſition or forfeiture of it in his life, yet it is a gift in Law unto him, if he do ſurvive his wife, but if he make no diſpoſition, and die before his wife, ſhe ſhall have it

it again; and the ſame Law is of Eſtates by Statute Merch. Stap. Eleg. and other Chattels reals in poſſeſſion. *l.8.fo.96. Matthew Mannings* caſe.

But if the husband charge the Chattel real of his wife, it ſhall not bind the Wife, if ſhe ſurvive him. 7 *H.6* 1.

If a feme ſole be poſſeſſed of a Chattel real and be thereof diſpoſſed, and then taketh husband, and the wife dieth, and the husband ſurviveth, this right is not given to the husband by the intermarriage, but the Executor or Adminiſtrato of the wife ſhall have it; ſo it is if the wife hath but a poſſibility. *vide.Sect.*58.

And ſo it is if the wife be poſſeſſed of Chattel reals in *auter droit*, as Executor, or Adminiſtrator, or as Guardien in Socage, *&c.Pl.Com.*294 *Osbornes* caſe, and *fo.*192.*b.Wroteſleyes* Caſe,

In the ſame manner if a woman grant a term to her own uſe, taketh husband and dieth, the ſurviving husband ſhall not have the truſt, but the Executors or Adminiſtrators of the wife, for it conſiſteth in privity, *P.*22.*El.* in *Cancell.Withams* caſe.

Chattels real conſiſting meerly in action, the husband ſhall not have by the intermarriage, unleſs he recover them in the life of the wife, albeit he ſurvive the wife, as a Writ of Right of Ward, *valore maritagii*, a forfeiture of Marriage, &c. whereunto the wife was intituled before the Marriage.

But Chattels real being of a mixt nature, *viz.* partly in poſſeſſion, partly in action, which happen during the Coverture, the husband ſhall have by intermarriage, &c. As if the husband be ſeiſed of a rent ſervice, charge, or ſeck, in the right of his wife, the rent become due during the Coverture, the wife dieth, the husband ſhall have the arrerages but if the wife ſurvive the husband, ſhe ſhall have them, and not the executor of the husband, 13 *E.*3.*Qu.imp.*57. 14 *H.*4. 12 *F. N.B.* 121.11 *R.* 2.*Account* 49. 12 *R.*2. *Brve* 639. 5 *E.*3 *Exec.*69.

So it is of an Advowſon, if the Church become void during

ring the Covertue, he may have a *Qu. Imp.* in his own name, as ſome hold: but the wife ſhall have it if ſhe ſurvive him, and the husband if he ſurvive her, 50 *E.* 3. 13. 28 *H.* 6. 9. 7 *H.* 7. 2.

Now by the ſtatute of 32 *H.* 8. cap 37. if the husband ſurvive the wife, he ſhall have the arrerages, as well incurred before the marriage, as after, *l.* 4. 51. *Ognels* caſe. *H.* 17 *El. Rot.* 457. in *Com. B. Sharps* caſe, *f.* 351, *b.*

But the marriage is an abſolute gift of all chattels perſonals in poſſeſſion in her own right, whether the husband ſurvive the wife or no; but they be in action, as debts by Obligation, Contract, or otherwiſe, the husband ſhall not have them, unleſs he and his wife recover them. And of perſonal goods *en auter droit*, as Executor or adminiſtrator, &c. the marriage is no gift of them to the husband although he ſurvive his wife, 21 *E.* 4. 4. 11 *H.* 7. 4. 26 *H.* 8. 7. 43 *E.* 3. 10. 4 *H.* 6. 5. 16 *E.* 4. 8.

If an eſtray happen within the Mannor of the wife, if the husband die before ſeiſure, the wife ſhall have it, for that the property was not in the wife before ſeiſure, 21 *E.* 3. 8. *vide* 10 *H.* 6. 11.

But note a diverſity between a property in perſonal goods and a bare poſſeſſion; for if perſonal goods be bailed to a feme, or if ſhe find goods, or if goods come to her hands as executor to a Bailiff, and taketh a husband, this bare poſſeſſion is not given to the husband, but the action of detinue muſt be brought againſt the husband and wife, 39 *E.* 3. 17.

Sect. 666. *Fol.* 351. *b.*

By this caſe it appeareth, That albeit there be no moities between husband and wife, yet this is a Remitter preſently, and ſtandeth not upon the ſurvivor of the wife, as ſome have thought; for if the eſtate gained by intermarriage be a ſufficient eſtate to work a Remitter, *à fortiori*, an eſtate made to the husband and wife, ſhall work a Remitter in the wife. And ſo it is if Tenant in Tail infeoff his iſſue being within

within age, and his wife in fee, and dieth, this a Remitter to the iſſue preſently, by the death of Tenant in tail, though ſome have thought the contrary. 21*E.*3.26.29*E.*3.43.19*E.*3. *Remit.*14.35*Aſſ.*12.26*E.*3.69.*vide* 676.*Sect.*11R.2.*Remit.*12. 44*E.*3.17.

Sect. 667. *Fol.* 352. *a.*

Eſtoppel, *i.e.* a Concluſion, becauſe a mans own act, or acceptance, ſtoppeth or cloſeth up his mouth to alledge or plead the truth. *L.*2. *fo.*4. *b. Goddards* Caſe. *S.* 41. *&* 693, 695, 679.

Note three kinds of Eſtoppel:

1. By matter of Record, *viz.* by Letters Patents, Fine, Recovery, Pleading, taking of Continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance, 43*Aſſ.*29.9*H.*4.7,8. 22*Aſſ.*54.15*E.*3.*Eſtop.*239.4*E.*3.*ib.*133.

2. By matter in writing, as by Deed indented, by making of an Acquittance by Deed indented, or Deed Poll, 4*H.*41. 8 *H.*7.6. 13*H.*7.24. 15*E.*4.28. 41*E.*3.*Eſtop.*12. 12R.2.*Eſtop.* 212. by Defeaſance, by Deed indented, or Deed Poll, 8*R.*2. *Eſtop.*283. 35*H.*6.18. 3*H.*6.16. 16*H.*7.5. 34*H.*6.19. 14*H.*4. 29.

3. By matter *in paiis*, as by Livery, by Entry, by Acceptance of Rent, by Partition, and by Acceptance of an Eſtate; as here in the Caſe that *Littleton* putteth, whereof *Littleton* maketh a ſpecial obſervation, That a man ſhall be eſtopped by matter in the Country, without any writing.

Note theſe few Rules concerning Eſtoppels:

1. That every Eſtoppel ought to be reciprocal, *i.e.* to bind both parties; and this is the reaſon, that regularly a ſtranger ſhall neither take advantage, nor be bound by the Eſtoppel, 33*H*6.19.50. 30*H.*6.2. 31*E.*3.*Eſtoppel* 240. 33*Aſſ.*18. 30*Aſſ.*51. 14*Aſſ.* 9. 18*E.*4. 1. Privies in blood, as the heir; privies in eſtate, as the feoffee, leſſee, &c. privies in Law, as the Lords by eſcheat; Tenant by the Curteſie, Tenant in Dower, the Incumbent of a Beneſice, and others that come under by act in Law, or in the Poſt, ſhall be bound and take advan-

advantage of Eſtoppels, and that a Rebutter is a kind of Eſtoppel, 8 *Aſſ.* 53. *Br. Fines* 73. 8 *H.* 6. 17. 21 *E.* 3. 35. 38 *E.* 3. 31. 20 *E.* 3. *Eſtop.* 187.

2. That every Eſtopple, becauſe it concludeth a man to alledge the truth, muſt be certain to every intent, and not to be taken by argument or inference, 21 *E.* 4. 4. 23 *Aſſ.* 14. 17 *H.* 6. *Eſtop.* 273. 18 *E.* 3. 30. 7 *H.* 6. 7. & 16.

3. Every Eſtoppel, ought to be a preciſe Affirmation of that which maketh the Eſtoppel, and not be ſpoken imperſonally, as if it be ſaid, *Ut dicitur, quia imperſonalitas non concludit, nec ligat,* 46 *E.* 3. 33. 29 *Aſſ.* 38. *Pl. Com.* 398. neither doth a recital conclude, becauſe it is no direct Affirmation, 35 *H.* 6. 33. 46 *E.* 3. 12. 49 *E.* 3. 14. 8 *Aſſ.* 3. 45 *Aſſ.* 5. 3. *El. Dyer* 196. 11 *El. Dyer* 280. 9 *H.* 6. 60.

4. A matter alledged that is neither traverſable nor material, ſhall not eſtop, 5 *E.* 4. 7. 8 *E.* 4. 19. 10 *E.* 4. 12. 22 *E.* 4. 38. 32 *Aſſ.* 9. 35 *H.* 6. 20.

5. Regularly a man ſhall not be concluded, by acceptance or the like, before his Title accrued, 33 *H.* 6. 16. 4 *E.* 3. 22. 6 *H.* 47. 31 *E.* 1. *Gard.* 155. *F. N. B.* 142. *E.*

6. Eſtoppel againſt Eſtoppel doth put the matter at large, 12 *H.* 7. 4. 20 *H.* 6. 29. 3 *H.* 4. 9. 41 *E.* 3. 4. 11 *H.* 4. 30.

7. Matters alledged by way of ſuppoſal in Counts, ſhall not conclude after Non-ſuit: otherwiſe it is after Judgment given; and after Non-ſuit, albeit the ſuppoſal in the Count ſhall not conclude, yet the Bar, Title, Replication, or other pleading of either party, which is preciſely alledged, ſhall conclude after Non-ſuit; and hereby are the Books reconciled; 2 R. 3. 14. 2 R. 2. *Eſtop.* 10. 40 *E.* 3. 21. 12 8. 4. 33. 18 *E.* 3. 31, 35. 44 *E.* 3. 45. 17 *Aſſ.* 27. 45 *E.* 3. 2. 21 *H.* 7. 14. 5 *E.* 4. 7. 7 *E.* 4. 19. 3 *E.* 4. 11. 4 *E.* 3. 54. 7 *E.* 6. *Br. Eſtop.* 162. 11 *H.* 4. 30. 30 *E.* 3. 21. 31 *Aſſ.* 41.

8. Where the verity is apparent in the ſame Record, the adverſe party ſhall not be eſtopped to take advantage of the truth, for he cannot be eſtopped to alledge the truth, when the truth, appeareth of Record. If a Fine

be

be levied without any Original, it is voidable, but not void; but if an Original be brought, and a Retraxit entred, and after that a concord is made, or a Fine levied, this is void in reſpect the variety appeareth of Record, 37 *Aſſ.* 17.38*H.*12. 3*El. Dyer* 222.

An Impropriation is made after the death of an Incumbent to a Biſhop and his Succeſſors; the Biſhop by Indenture demiſeth the Parſonage for forty years, to begin after the death of the Incumbent, the Dean and Chapter confirm it, the Incumbent dyeth, this demiſe ſhall not conclude, for that it appeareth he had nothing in the Impropriation, till after the death of the Incumbent, 7*Eliz. Dyer.*244.

9 Where the Record of the Eſtoppel doth run to the diſabiltty, or illegitimation of the perſon, there all ſtrangers ſhall take benefit of the Record, as Outlawry, excommengement, Profeſſion, Attainder of *Præmunire*, of Felonies, &c. Baſtardy, Mulierty, and ſhall conclude the party, though they be ſtrangers to the Record, *Vide* Sect. 196.197, &c.

But of a Recoed concerning the name of the perſon, quality or addition, no ſtranger ſhall take advantage, becauſe he ſhall not be bound by it.

But *Nota*, Reader, That in caſe of the Mulierty *prima facie*, an eſtranger ſhall take benefit of it, &c. But yet becauſe he may be a Mulier by the Eccleſiaſtical Law, and a Baſtard by the Common Law, therefore againſt ſuch a Certificate pleaded, the adverſe party may allege the ſpecial matter, and confeſs the Certificate of the Biſhop, according to the Eccleſiaſtical Law, and allege further the ſpecial matter according to the Common Law, whereunto the adverſe party muſt anſwer, and ſo are the Books reconciled, *Bract. fo.*420, 26 *Aſſ.*64. 39 *Aſſ.* 15.11 *H.* 4.84.7 *H.*6.7.33 *Aſſ.*5.11 *E.*3. *Eſtop.* 229.21 *E.*3.39.19 *R.*2 *Eſtop.* 28.2.3 *E.*23.3.*ib.*33 *E.*3 *Eſtop. Statham. Stat.* 9 *H.*6.*c.*11.30 *H,*6.2 *D. & St.*69.34*H.*6 39.18 *E.*4.2 *b*,10 *E.*4.16.

Sect.

Sect. 669. Fo. 353 a.

When a feme covert is received, ſhe ſhall plead, as if ſhe were ſole; and this is regularly true, yet holdeth not in all caſes: for if a feme covert be received in an Aſſize, and plead a Record and fail, therefore ſhe ſhall not be adjudged a diſſeiſor, as ſhe ſhould be if ſhe were ſole, &c. 37 *Aſſ.* 1.

So if a feme covert only levy a Fine executory, and a *Scire fac'* is brought againſt her and her husband, if ſhe be received upon the default of her husband, ſhe ſhall bar the Conuſee, which if ſhe had been ſole ſhe could not do, and in ſome other caſes, 17 *Aſſ.* 17. 29 *E.* 3. 43. 5 *E.* 3. 138. *Voucher.*

Again, If the husband levy a Fine of his wives land, and the Conuſee grant and render, the land to the husband and wife, although the wife be not party to the Original, nor to the Conuſans and therefore ſhe ought not by the Law to take any preſent eſtate, but by way of remainder only: yet here it is proved by *Littlton*, That the grant and render *de facto* to the wife *in præſenti*, is not void, for then it could not work a Remitter, but voiable by Writ of Error, and that avoidable eſtate doth work a Remitter, *T.* 27 *El. inter Owen & Morgan, Rot.* 276 *in Com. B. l.* 3. *f.* 5. *Marq.* of *Wincheſtors* caſe, 7 *E.* 3. 64. 13 *E.* 3. *Vouch.* 119. *Vide Sect.*

Sect. 670. Fo. 353 b.

Si Baron & Feme feſont un conuſance de droit a un auter &c. ou feſoient un grant & render a un auter, ou releaſe per fine a un auter, &c. lou le droit del feme paſſera del feme performe de meſme fine, en tout tiels caſes, le feme ſerra examine devant que le fine ſoit accept, pur ceo que tiels fines concludont tiels femes covert a touts jours, &c. mes lou riens eſt move en le fine forſque tantſolement, que le baron & la feme pregnant eſtate per force de meſme le fine, ceo ne conclud' la feme, pur ceo que en tiel caſe, el james ne ſerra my examine, &c. 15 *E.* 4. 28. 14 *E.* 3. 31.

Therefore if the husband and wife be Tenants in ſpecial Tail, and they levy a Fine at the Common Law, and after

the husband and wife take back an eſtate to them and their heirs, in this caſe the eſtate tail is not barred; and yet againſt a Fine levied by her ſelf, ſhe cannot be remitted, becauſe thereupon ſhe was examined; but in that caſe if the land deſcend to her iſſue, he ſhall be remitted, 29*E.* 3. 43. 43*E.* 3. 5.

Sect. 671.

Note a diverſity between a Remitter and a Diſcent: For if a woman be diſſeiſed, and being of full age taketh huſband, and then the diſſeiſor dieth ſeiſed, this diſcent ſhall bind the wife, albeit ſhe was covert when the diſcent was caſt, becauſe ſhe was of full age when ſhe took husband. But albeit the wife that hath an ancient right, and being of full age, taketh a husband, and the Diſcontinuee letteth the land to the husband and wife for their lives, this is a Remitter to the wife; for Remitters to ancient Rights are favoured in Law.

Sect. 672. *Fo.* 354. *a.*

Here it appeareth, That the husband againſt his own alienation, if he had taken the eſtate to him alone, could not have been remitted: But when the eſtate is made to the huſband and wife, albeit they be but one perſon in Law, and no moities between them, yet for that the wife cannot be remitted in this caſe, unleſs the husband be remitted alſo, and for that Remitters are favoured &c. therefore in this caſe in Judgment of Law, both husband and wife are remitted, which is worthy of great obſervation.

Sect. 673. *Fo.* 354. *b.*

Littleton having ſpoken of Remitters to the iſſue in Tail, who is privy in blood; and to the wife who is privy in perſon, now he ſpeaketh of Remitters to them in reverſion or remainder expectant upon an eſtate Tail, who are privy in eſtate: and this caſe proveth, That the wife is remitted preſently; for the equity of the Law requireth, that as the diſcon-

continuance of the eſtate in Tail, is a diſcontinuance of the reverſion or remainder, ſo that the Remitter to the eſtate Tail, ſhould be a Remitter in the reverſion or remainder, 41 *E.*3.17. 41 *Aſſ.*1.36 *Aſſ.p.*4.

Tenant for life, the remainder to A. in Tail, the remainder to B. in fee; Tenant for life is diſſeiſed, a collateral Anceſtor of A. releaſeth with Warranty, and dieth, whereby the eſtate Tail is barred, the Tenant for life re-enters, the diſſeiſor hath an eſtate in fee ſimple, determinable upon the eſtate Tail, and the remainder of B. is reveſted in him. And ſo note in this caſe, the eſtate for life, and the remainder in fee, are reveſted and remitted, and an eſtate of inheritance left in the diſſeiſor, 44 *Aſſ.p.*15.44.*E.*3.30.

If a Fine be levied *ſur grant & rend.* to one for life, or in tail, the remainder in Fee, if Tenant for life, or in tail execute the eſtate for life, or in tail, this is an execution of the Remainder. 20 *E.*3. *Aid.*29.

A gift in tail is made to *B.* the remainder to *C.* in fee, *B.* diſcontinueth and taketh back an eſtate in tail: the remainder in Fee to the King by Deed inrolled, Tenant in tail dieth, his iſſue is remitted, and conſequently the remainder, as *Littleton* here ſaith, and the diverſity is between an Act in Law, for that may deveſt an eſtate out of the King, and a tortious Act, or entry, or a falſe and a feigned recovery againſt Tenant for life, or in tail, which ſhall never deveſt any Eſtate, remainder or reverſion out of the King. *Pl.Com.*489. *Nichols* caſe, and 553. *Wolſinghams* caſe, 17*El.Dy.*344. 25*E.*3. 48. *Reſceit* 18.49*E.*3.16. *Sn'r. Staffords* caſe, *l.*8.*fo.*76.*b.*

But a Recovery by good Title againſt Tenant for life, or in tail, where the remainder is to the King by defeaſable Title ſhall deveſt the remainder out of the King, and reſtore and remit the right owners. *Cholmleys* caſe, *l.*2.53. 7*R.*2. *Aid le Roy* 61.22*E.*3.7.

*Sect.*674,675. *Fo.*355.

Quod ei deforceat, is a Writ that is given by the Statute of *W.*2.*c.*4. to any Tenant for life, or in tail upon a Recovery by

default againſt them in a *Precipe*, and lieth againſt the Recoveror and his heirs; in which caſe the particular Tenant was without remedy at the common Law, becauſe he could not have a writ of right. There hath been a queſtion in our Books upon theſe words by default, &c. And ſome do hold contrary to three Objections made, &c. And as to the firſt they ſay, That albeit that in the writ of waſte, judgment is not only given upon the default, yet the default is the principal, and the cauſe of awarding of the writ; to enquire of the waſte is an incident thereunto: and the Law always hath reſpect to the firſt and principal cauſe, and therefore upon ſuch a Recovery, a writ of deceit lieth, and that writ lieth not but where the recovery is by Default. 17 *E.*3.58. 29 *E.*3. 42 *FN P.*98. *b.* 12 *P.*4.4.19 *E.*2. *Diſceit* 56. *w.*2 *c.*3.3 *H.*4.1.

So in action of waſte againſt the Husband and wife, upon the default of the Husband the wife ſhall be received, and yet the Satute there ſpeaketh alſo *per defaltam.* So upon ſuch a recovery in waſte againſt the Baron and feme by default, the wife ſhall have a *cui in vita* by the Statute, and it ſpeaketh where the recovery is *per default.* 9 *E.*4.16. and albeit the defendant may give in evidence, if he knoweth it, yet when he makes default, the Law preſumeth he knoweth not of it, and it may be that in truth he knew not of it; and therefore it is reaſon, that ſeeing the ſtatute, that is a beneficial Statute hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the truth and right ſhall be tried; and ſo it is of a Recovery by default in an Aſſ. albeit the Recognitor of the Aſſ. give a verdict, a *Quod ei deforceat* lieth; and all this was reſolved by the whole Court of Common Pleas, and ſo the doubt in 41 *E.*3.8. well reſolved. 2 *H.*4.2.21 *H.*6.56.44 *E.* 3.42. *Br. quod ei deforceat.*4 *P.* 33 *Eliz. Rot.* 1125. *inter Ed. Elmer*, and *William Thacker in quod ei deforceat.*

Nota, If Tenant for life make default after default, and he in Reverſion is received and pleads to iſſue, and it is found by verdict for the demandant, the default and the verdict are cauſes of the judgment, and yet the Tenant ſhall have a *quod ei deforceat.*

As

As to the 2. *Obj.* That the defendant may have an Attaint, 1. It was utterly denied, that an Attaint did lie in this caſe, for though it be taken by the Oath of 12 men yet it is but an Enqueſt of Office, whereupon no Attaint did lie on either party, as upon an enquiry of Colluſion, although it be by one Jury, nor upon a Verdict in a *Quale jus.*

2. Admitting that an Attaint did lie in that caſe, yet it followeth *ex conſeq.* that a *Quod ei deforceat* did not lie, 33 *E.* 3. *Quod ei deforceat pl. ult. F N. B.* 156. *Fleta l.* 5. *ca.* 11. 48 *E.* 3. 19. 40 *Aſſ.* 23. 33 *H.* 6. 25. 39 *H.* 6. 1. *F N. B.* 107.

For if an Aſſ. be taken by default, a *Quod ei deforceat* doth lie, and yet the party may have an Attaint, for this is no enqueſt of Office, but a Recognition by the Recognitors of an Aſſ. who were returned the firſt day, and not returned upon the awarding of the Aſſ. by default. 17 *E.* 2. *Attaint* 69. 21 *H.* 6. 56. 34 *H.* 6. 12.

As to the 3. *Obj.* That the damages ſhould be the principal, becauſe they were at the Common Law, that is an Argument that they are more ancient, but not that they are more principal, and treble damages were not at the Common Law (for the Common Law never giveth more damage than the loſs amounteth unto) but are given by the Statute of *Glouceſter*; but the place waſted is worthier being in the realty, than damages that be in the perſonalty, *Et omne majus dignum, trahit ad ſe minus dignum, quamvis minus dignum ſit antiquius, & à digniori fieri debet denominatio*; and it is confeſſed, That in an action of Waſte, againſt Tenant for life, or for years, the place waſted is the principal, becauſe the Statute of *Glouceſter* doth give the place waſted and treble damages at one time; for no prohibition or action of waſte lay againſt them at the Common Law, and in an action of waſte, 34 *H.* 6. *Waſte* 50.

And in an action of Waſte, if the defendant confeſs the Action, the plaintiff may have Judgment for the place waſted, and releaſe the damages, which proveth that the damages are not principal, for a man ſhall never releaſe the principal, and have judgment of the Acceſſory, and an acti-

on of waſte againſt Tenant for life, is as real, as an action againſt Tenant in Dower; and as to the caſe of *9 H. 5.* It was anſwered, that it was an action in the *Tenuit*, which is only in the perſonalty, and then the releaſe of one doth bar both, neither could ſummons and ſeverance lie in that caſe, but in action of Waſte (in the *Tenet*) either againſt Tenant for life, or years, the releaſe of the one doth not bar the other, and in thoſe two caſes, Summons and Severance doth lie. *6 E.* 3. 47, *48 E.* 3. 19.

But when theſe 3 points were reſolved by the Court for the demandant, then the counſel of the Tenant moved in arreſt of Judgment another point, *viz.* That the Judgment was given upon a *Nihil dicit*, which is always after appearance, and not *per defaltam*, and thereupon judgment was ſtayed.

But to return to *Littleton*. Here he openeth a ſecret of Law, for the cauſe of this Remitter is, for that the Tenant for life in this caſe might have a *Quod ei deforceat*. And the Tenant for life at the Common Law was remedileſs, becauſe he could not have a writ of Right, and conſequently the feme Covert in this caſe could not be remitted by the taking of an eſtate to her husband, and her, becauſe her right was remedileſs, and could have no action. But when an Act of Parliament, or a Cuſtom doth alter the reaſon, &c. thereby the Common Law it ſelf is altered, if the Act of Parliament and Cuſtom be purſued, for *Alterata cauſa & ratione legis, alteratur & lex, & ceſſante cauſa & ratione leg. ceſſat & lex*; and in this caſe, the Statute of *W.* 2. giving remedy to this feme Tenant for life, in this caſe it giveth her ability to be remitted, &c. *14 H.* 7. 11. *per Fineux* 27 *H.* 8. 4. 6. *Aid.* 35 *H.* 6. *gard* 72. 29 *E.* 3. *per Wilbie, Cuſtom, l.* 3. *fo.* 86. Juſtice *Windhams* caſe.

And *Littleton* warily putteth this caſe, That the Recovery was had againſt the feme, while ſhe was ſole, for there was a time when it was a queſtion, whether a Recovery being had by default againſt the husband and wife (the wife being Tenant for life) the ſaid Statute gave a *Quod ei deforceat* to the husband and wife, for that the Statute gave it againſt Tenant in dower, and Tenant for life, &c. and here the husband is

not

not Tenant for life, but ſeiſed in the right of his wife, and therefore out of the Statute; and of this opinion is one book. (*But *Apices juris non ſunt jura, & parum differunt quæ re concordant)* * 4*E.* 3. 38. 33 *E.* 3. *Avowry* 255.

The contrary hath been adjudged, and ſo that point is now in peace. 5*E.* 3. 4. 33 *E.* 3. 255. *F. N. B.* 156. *a.* 5*E.* 3. 5. 2*E.* 4. 13. *F. N. B.* 156. *c.* 3. 3 *H.* 6. 46. 2 *E.* 4. 11. 19 *E.* 4. 2.

And the like in caſe of Reſceit for him in reverſion. But if the Husband loſe by default, and the husband die, the wife ſhall not have a *Quod ei deforceat*, for a *Cui in vita* is given to her in that caſe by a former Statute, *viz. W.* 2. *ca.* 3.

Theſe things are worthy of due obſervation, &c. and *Littleton* in our books of another kind of *Quod ei deforceat* at the Common Law upon a diſſeiſin. *Fo.* 356. *a.*

When the reverſion is deveſted, the leſſor cannot have an action of waſte, becauſe the Writ is, That the leſſee did waſte *ad exhæredationem* of the Leſſor, and that inheritance muſt continue at the time of the Action brought.

And *Nota*, That in an action of Waſte brought by the leſſor againſt the leſſee, the Leſſee in reſpect of the privity cannot plead general * *rien en le reverſion.* But he muſt ſhew how and by what means the reverſion is deveſted out of him: and this holdeth between the leſſor and leſſee; but if the grantee of the reverſion bringeth an action of Waſte, the leſſee may plead generally, That he hath nothing in the reverſion 45*E.* 3. 21. 44*E.* 3. 34, 35. *F. N. B.* 60. 23 *H.* 8. *Waſte, Br.* 138. * 46*E.* 3. 20 8*H.* 6. 13. 30 *H.* 6. 7.

And yet in ſome ſpecial caſes an action of waſte ſhall lie, albeit the leſſor had nothing in the reverſion at the time of the waſte done. As if Tenant for life make a feoffment in Fee upon condition, and waſte is done, and after the leſſee reenter for the condition broken, in this caſe the leſſor ſhall have an action of Waſte. And ſo if a Biſhop make a leaſe for life or years, and the Biſhop die, the leſſee, the See being void, doth waſte, the ſucceſſor ſhall have an action of waſte. So if Leſſee for life be diſſeiſed, and waſte is done, the leſſee reenter, an action of Waſte ſhall be maintained againſt the leſſee, and ſo in like caſes.

Here note, that albeit the Action be falſe and feigned, yet is the recovery ſo much reſpected in Law, as it worketh a diſcontinuance. But if Tenant for life ſuffer a common recovery, or any other recovery by covin and conſent between the Tenant for life and the recoveror, this is a forfeiture of his eſtate, and he in the reverſion may enter, &c. *5 Aſſ. p.* 3. *5 E.* 3. *Enter cong.* 42. *15 E.* 3. *Age* 95. *41 E.* 3. 18. *per Finchden*, 22 *E.* 3. 2. *lib.* 1. 15. Sir *William Pelhams* caſe.

Since our Author wrote, the Statute of 14 *El. cap.* 8. hath been made concerning this matter: *Vide l.* 3. 60. *Lib.* 1. *fo.* 15.

And *Nota*, That although the diſcontinuance groweth by matter of Record, yet the Remitter may be brought by matter in *paiis*.

Sect. 676. *Autor. al. Contr.* 44 *E.* 3. 17. 44 *Aſſ.* 2. 43 *Aſſ.* 3.
Vide Sect. 656.

Sect. 677. *Fol.* 356. *b.*

In this caſe the eſtate is in the feme covert preſently by the livery before any agreement by the husband, *15 E.* 4. 1. *b.* 7 *H.* 6. 17. 1 *H.* 7. 12. *b.* 39 *E.* 3. 30. 57 *H.* 8. 24.

If the wife ſurvive her husband ſhe cannot claim in by the purchaſe made during the coverture, but the Law adjudgeth her in her better right. *41 E.* 3. 18.

But if both eſtates be waivable, there albeit the wife *prima facie* is remitted, yet after the deceaſe of her husband, ſhe may elect which of the Eſtates ſhe will. As if lands be given to the husband and wife, and their heirs, the husband make a feoffment in fee, * the Feoffee giveth the husband and wife, and the heirs of their two bodies, the husband dieth. 18 *El. Dy.* 351. * the Feoffee giveth land to the husband and wife, &c.

If Lands be given to a man, and the heirs females of his body, and he maketh a feoffment in fee, and take back an eſtate to him and his heirs, and dieth having iſſue a daughter leaving his wife groſſment enſeint with a Son, and dieth

th, the daughter is remitted, and albeit the Son be afterward born, he ſhall not deveſt the Remitter.

Sect. 678. *Fol.* 357.

Covin and conſent in many caſes to do a wrong, do choak a meer right, and the ill manner doth make a good matter unlawful, 18 *E.* 4. 2. *b.*

Covina, is a ſecret aſſent determined in the hearts of two or more, to the defrauding and prejudice of another. *Pl. Com.* 546. *Wimb.*

If a Diſſeiſor, Intrudor, or Abator do endow a woman that hath lawful Title of Dower, this is good, and ſhall bind him that right hath, if there were no covin or conſent before the diſſeiſin &c. 44 *E.* 3. 46. 11 *H.* 4. 60. 44 *Aſſ.* 29. 19 *H.* 8. 12. 18 *H.* 8. 5. 11 *E.* 4. 2. 7 *H.* 7. 11.

In all caſes where a man hath a rightful and juſt cauſe of action, yet if he of covin and conſent do raiſe up a Tenant by wrong, againſt whom he may recover, the covin doth ſuffocate the right, ſo as the recovery though it be upon a good Title ſhall not bind, or reſtore the Demandant to his right, 41 *Aſſ. p.* 28. 25 *Aſſ. p.* 1. 27 *Aſſ.* 74. 15 *E.* 4. 4. *a.* 12 *Aſſ. p.* 10.

If Tenant in tail and his iſſue diſſeiſe the diſcontinuee to the uſe of the Father, and the Father dieth, and the land deſcend to the iſſue, he is not remitted againſt the diſcontinuee, in reſpect he was privy and party to the wrong, but in reſpect of all others he is remitted, and ſhall deraign the firſt Warranty. 11 *E.* 4. 2. 15 *E.* 4. 23. 14 *H.* 8. 12. 33 *H.* 6. 5. 12 *E.* 4 21. *b.*

A. and *B.* Joyntenants be intituled to a real action, againſt the heir of the diſſeiſor; *A.* cauſe the heir to be diſſeiſed, againſt whom *A.* and *B.* recover and ſue execution, *B.* is remitted, for that he was not party to the covin, and ſhall hold in common with *A.* but *A.* is not remitted, *fo.* 357. *b.*

Nota, it is regularly true, That a feme covert cannot be a diſſeiſoreſs by her commandment or procurement precedent, nor by her aſſent or agreement ſubſequent, but by her actu-

al entry or proper act ſhe may be a diſſeiſoreſs: and therefore ſome do hold, that *Littleton* muſt be intended, that the husband and wife were preſent when the diſſeiſin was done; and others do hold, that *Littleton* is good Law, albeit ſhe were abſent, for if that her procurement or agreement be to do a wrong, to cauſe a Remitter unto her, in this ſpecial caſe ſhe ſhall fail of her end, and remitted ſhe ſhall not be; but in this ſpecial caſe ſhe ſhall be holden as a diſſeiſoreſs by her covin and conſent, *quatenus* to hinder a Remitter, *F.N.B.* 179. *g.* 12 *E.* 4. 9. 35 *Aſſ.* 5. 44 *E.* 3. 9. 23. 13 *Aſſ.* 1. *Temps E.* 1. *Waſte* 128. 16 *Aſſ. p.* 7. 21 *E.* 4. 5 3. 21 *H.* 7. 35. 3 *H.* 4. 17.

Sect. 679.

Vide Pl. Com. Amy Townſends Caſe, 12 *R.* 2. *Remit.* 12.

Sect. 680, 681. *fo.* 358.

Here note five things: 1. That a remainder expectant upon an eſtate for life, worketh no Remitter, but when it falls in poſſeſſion: for before his time he can have no action and no Freehold in him, 18 *H.* 8. 3.

2. Though the woman might wave the remainder, yet becauſe ſhe is preſently by the death of the husband Tenant to the *Præcipe*, it is within the rule of Remitter, and her power of waiver is not material.

3. That a Freehold in Law being caſt upon the woman by act of Law, without any thing done or aſſented to by her, doth Remit her, albeit ſhe be then ſole and of full age, *vide S.* 447.

4. That a *Præcipe* lieth againſt one that hath but a Freehold in Law.

5. That a woman ſhall be endowed where the husband hath the inheritance, and but a Freehold in Law, *Brit.* 83. *b.*

Sect. 682, 683, 684, 685. *Fo.* 359.

Vide 12 *E.* 4. Compare theſe four Sections well together.

*A

* A man abſent can neither take Livery nor make Livery without Deed. *Temps H.8. Feoffments, Br.72.40E.3.41.10E.4.1.a.15E.4.18.18E.4.12.22H.6.12.*

Verba relata hoc maxime operantur per referentiam, ut in eis ineſſe videntur. Et le fits nient conuſant de ceo ne agrea a le feoffment, &c. Here it appeareth, that if the Son be Conuſant, and agreeth to the feoffment, &c. This is no Remitter to him. *Vide Sect.682.*

If *A.* be ſeiſed in Tail, and have iſſue two Sons, and by Deed indented between him of the one part, and the Sons of the other part, maketh a leaſe to the eldeſt for life, the remainder to the ſecond in fee, and dieth, and the eldeſt Son dieth without iſſue, the ſecond Son is not remitted, becauſe he agreed to the remainder in the life of the Father or if the like eſtate had been made by parol, if in the life of the Father, the Tenant for life had been impleaded, and made default, and he in the remainder had been received, and thereby agreed to the remainder, after the death of the Father, and the eldeſt Son without iſſue, the ſecond Son ſhould not be remitted, becauſe he agreed to the remainder in the life of the Father.

Sect. 685. Fo.360.a.

Acts of Parliament are to be ſo conſtrued, as no man that is innocent, or free from injury or wrong, be by a literal conſtruction puniſhed, or endamaged: and therefore in this caſe, albeit the Letter of the Statute is generally to give damage againſt him that is found Tenant, and the caſe that *Littleton* here putteth, *D.* being ſurvivor, is conſequently found Tenant of the Land: yet becauſe he waived the eſtate, and never agreed to the Feoffment, nor took any profits, he ſhall not be charged with the damages.

Sect.686,687. Fol.360.b.

Feint (ou fained) action, eſt tiel action, que coment que les parols de le breve ſont voyers, encore pur tout ceo ne cauſe home nad cauſe ne.

ne title per la ley de recover per meſme le action. Et faux action eſt lou les parols de breve ſont faux.

Sect. 687. poſtea vide.

As diſcents do remit the heir which comes in the *Per*, ſo ſucceſſion doth remit the ſucceſſor, albeit he cometh in the *poſt*; and ſo in other caſes where the iſſue in tail of full age ſhall be remitted, there in the like caſe ſhall the ſucceſſor be remitted alſo, and all mean charges and incumbrances. *Vide Sect. 150. Stat. Merton.*

Sect. 688. Fo. 361. a.

Si home ſuiſt faux action, &c. & recover envers le Tenant en tail per default. *Littleton* addeth (by default) becauſe if the recovery paſſed upon an iſſue tried by verdict, he ſhall never falſifie in the point tried, becauſe an attaint might have been had againſt the Jurors; and albeit all the Jurors be dead, ſo as the attaint do fail, yet the iſſue in Tail ſhall not falſifie in the point tried, until it be lawfully avoided, *pro veritate accipitur.* As if the Tenant in tail be impleaded in a *Formedon*, and he traverſe the gift and it is tried againſt him, and thereupon the demandant recover; In this caſe the iſſue in tail ſhall not falſifie in the point tried, but he may falſifie the recovery by any other matter: as the Tenant in tail might have pleaded a collateral warranty, or a releaſe, as *Littleton* here putteth the caſe, or to confeſs and avoid the point tried; and *Littletons* caſe holdeth not only in a Recovery by default, whereof he ſpeaketh, but alſo upon a *Nihil dicit*, or confeſſion, or demur. 12 *E.* 4. 19. 13 *E.* 4. 3. 11 *H.* 4. 89. 7 *H.* 4. 17. 14 *H.* 7. 10, 11. 28 *Aſſ.* 32. 52. 34 *Aſſ.* 7. 10 *H.* 6. 5. 19 *H.* 6. 39. *Br. faux Recovery* 55.

Sect. 689. Fol. 361. b. Vide Sect. 686, 687.

Here note, That a Remitter may be had after a recovery upon a feint action by a diſſeiſin and a diſcent, as well as by a diſcent after a diſcontinuance by a Feoffment, &c.

Sect.

Sect. 690. *Fo.* 362. *a.*

Here it appeareth, that if a Judgment be given againſt a Tenant in tail, upon a feint or falſe action, and Tenant in tail dye before execution, no execution can be ſued againſt the iſſue in tail, 10 *H.* 6. 6. 12 *E.* 4. 20. 23 *El. Dy.* 276. *l.* 1. *f.* 106. *Shelleys* caſe, *Pl. Com.* 55. *& vide les Autors ſupra* cited, &c.

But if in a common recovery Judgment be had againſt Tenant in tail, where he vouched and hath Judgment to recover over in value, albeit Tenant in tail die before execution, yet the recoveror ſhall execute the Judgment againſt the iſſue in tail, in reſpect of the intended recompence, and for that it is the common aſſurance of the Realm, and is well warranted by our Books, and was not invented by Juſtice *Choke*, in the time of *E.* 4. (as ſome hold by tradition) but it may be that it was, upon former Authors and opinions of Judges diſcovered by him, aſſented unto by the reſt of the Judges. *Vide S.* 709. 15 *E.* 3. *Bre.* 324. 1 *E.* 4. 5. 5 *E.* 4. 2. 12 *E.* 4. 20. 23 *El. Dy.* 376. *l.* 10. 37, 38. *Mary Portingtons* caſe.

If a recovery be had againſt Tenant for life without conſent or covin, though it be without Title, and execution be had, and Tenant for life dieth, the reverſion or remainder is diſcontinued, &c. but if ſuch a Recovery be had by covin between the Demandant and Tenant for life, then he in the reverſion or remainder may enter for forfeiture. So it is if Tenant for life ſuffer a common recovery at this day, it is a forfeiture of his eſtate. 5 *Aſſ.* 3. 5 *E.* 3. *Enter cong.* 42. *lib.* 1. 15, 16. Sir *William Pelhams* caſe.

Since *Littleton* wrote, there were two Statutes made for preſervation of Remainders, and reverſions expectant upon any eſtate for life, the one in 32 *H.* 8. the other in 14 *El.* But 32 *H.* 8. extendeth not to Recoveries, when Tenant for life came in as vouchee, &c. and that Act is repealed by 14 *El.* and full remedy provided for preſervation of the entry of them in reverſion or remainder. But the Statute of 14 *El.* extending not to any recovery, unleſs it be by agreement or covin. 32 *H.* 8. *ca.* 31. 14 *El. ca.* 8.

2. If

2. If there be Tenant for life, the remainder in Tail, the reverſion or remainder in fee, if Tenant for life be impleaded by agreement, and he voucheth Tenant in Tail, and he vouch over the dommon vouchee, this ſhall bar the reverſion or remainder in fee, although he in the reverſion or remainder did never aſſent to the recovery, becauſe it was not the intent of the Act to extend to ſuch a recovery, in which a Tenant in Tail was vouchee; for he hath power by common recovery, if he were in poſſeſſion, to cut off all Reverſions and Remainders. *L.3. fo.60,61. Lincoln Coll.* Caſe.

So if Tenant for life had ſurrendred to him in Remainder in tail, he might have barred the remainders and reverſions expectant upon his eſtate.

3. Where the Proviſo of the Act ſpeaketh of an aſſent of Record by him in reverſion or remainder, it is to be underſtood, that ſuch aſſent muſt appear upon the ſame Recovery, either upon a Voucher, *Aid prier*, Receit, or the like, for it cannot appear of Record, unleſs it be done in courſe of Law, and not by any extrajudicial entry, or by *Memorandum*.

Sect.691. Fo.362.a.

Here it appeareth, That upon plea of Non-tenure, or of a diſclaimer of the Tenant in a *Formedon* in the deſcender, albeit the expreſs Judgment be, that the Tenant ſhall go without day, yet in the Judgment of Law, the demandant may enter according to the title of his Writ, and be ſeiſed in Tail, notwithſtanding the diſcontinuance. *5E.4.1.36H.6.29.6E.3. 8.4E.4.38.Bract.l.5.f.431,&c. Brit.ca.84.*

And in this caſe the demandant hath not two rights, but hath only one ancienter right, and is reſtored to the ſame by courſe of Law, and ſo a Remitter here (in a large ſence) is taken for a recontinuation of the right.

Here note, that in ſuch a *Præcipe*, where the demandant is to recover damages, if the Tenant plead non-tenure or diſclaim, there the demandant may aver him to be Tenant of the Land, as his Writ ſuppoſes for the benefit of his damage,

mage, which otherwiſe he ſhould loſe, or pray judgment and entry. 13*H.*7.28.22*H.*6.44.

But where no damages are recovered, as in a Formedon in diſcender, &c. there he cannot aver him Tenant, but pray his judgment and enter, for thereby he hath the effect of his ſuit, *& fruſtra fit per plura quod, &c.* 8*E.*3.434. 24*E.*3.9. 11*H.*4. 16. *&* 7*H.*6.17.

A general averment is the concluſion of every plea to the Writ, or in bar of replication, and other pleadings (for Counts or Avowries in nature of Counts need not be averred) containing matter affirmed ought to be averred, *& hoc paratus eſt verificare, &c.* Particular averments are, as when the life of Tenant for life, or Tenant in tail are averred, and there, though this word (*verificare*) be not uſed, but the matter avouched and affirmed, it is upon the matter an averment, and an averment containeth as well the matter, as the form thereof.

*Sect.*692. *Fo.*363. *a.*

Albeit in this caſe, and in the caſe before, the entry of the demandant is his own act, and the demandant hath no expreſs judgment to recover, yet he ſhall be remitted, *cauſa qua ſupra.* 36*H.*6. *fo.* 29.

*Sect.*693. *Fo.*363. *b.*

Here note a diverſity. If a man of full age having but a right of action, taketh an eſtate to him, he is not remitted. But where he hath the right of entry, and taketh an eſtate, he by his entry is remitted, becauſe his entry is lawful; and if the diſſeiſor infeoff the diſſeiſee and others, the diſſeiſee is remitted to the whole, for his entry is lawful: otherwiſe it is if his entry were taken away. 29*Aſſ. p.*26.43*Aſſ.*3. 11*H.*7.20. 3*H.*6. 19.40*E.*3.43.

If Tenant in tail be of a Manor, whereunto an Advowſon is appendant, the Tenant in tail diſcontinue in Fee, the diſcontinuee grant away the Advowſon in Fee, and dieth, the iſſue in tail recontinueth the Manor by Recovery, he is thereby

by remitted to the Advowſon; and he that right hath ſhall preſent when the Church becometh void. 8.*R.* 2. *Qu. imp.* 199.26 *H.* 8.4.*F.N.B.*36.*&* 35.*b.*

The Patron of a benefice is outlawed, and the Church become void, an eſtranger uſurpeth, and ſix months paſs, the King doth recover in a *Qu.imp.* and remove the incumbent; &c. Advowſon is continued to the rightful patron. 22.*Aſſ. p.*33. *Theobald Grinvile*; and ſo note a diverſity; a remitter cannot be properly, unleſs there be two Titles, but a recontinuance may be where there is but one.

If the diſſeiſor by Deed Indented make a Leaſe for life, or a gift in Tail, &c. yet the Deed Indented ſhall not ſuffer the livery made according to the form and effect of the Indenture to work any Remitter to the diſſeiſee, but ſhall eſtop the diſſeiſee to claim his former eſtate: and if the diſſeiſor upon the feoffment, doth reſerve any Rent or Condition, &c. the rent or condition is good, 13*H.*4.5.3*H.*4.17.8*H.*4 8. 12*H.* 4.19.35*Aſſ.*8.17*Aſſ.*3.43*E.*3.17. *Parkers* Caſe, 21*H.*6.2. *per Paſton.*

*Sect.*695.*Fo.*364.*a.*

Note a diverſity, A claim in *paiis* ſhall not hinder Remitter, otherwiſe it is a claim of Record, becauſe that doth work a concluſion.

*Sect.*696. *Fol.*344.*b.*

Here note a (notable) diverſity: If two Joyntenants, or Coparceners joyn in a real action, where their entry is not lawful, and the one is ſummoned and ſevered, and the other purſueth and recovereth the moity, the other Joyntenant or Coparceners ſhall enter and take the profits with her, becauſe their remedy was one and the ſame. But where two Coparceners, and they are diſſeiſed, and a diſcent is caſt, and they have iſſue and die, if the iſſue of the one recover her moity, the other ſhall not enter with her, becauſe their remedies were ſeveral, and yet when both have recovered, they are Coparceners again. 10*H.*6.10.19*H.*6.45.31*H.*6.*Ent. Cong.* 54.

So

So here in this caſe that *Littleton* putteth then two Joyntenants have not equal remedy, for the Infant hath a right of Entry, and the other a right of action; and therefore the Infant being remitted to moity, the other ſhall not enter and take the profits with her.

If *A.* and *B.* Joyntenants in fee be diſſeiſed by the Father of *A.* who dieth ſeiſed, his Son and heir enter, he is remitted to the whole, and his Companion ſhall take advantage thereof. Otherwiſe here in the Caſe of *Littleton*, for that the Adventure is given to the Infant more in reſpect of his perſon, than of his right, whereof his Companion ſhall take no advantage. But if the Grandfather had diſſeiſed the Joyntenants, and the land had diſcended to the Father, and from him to *A.* and then *A.* had died, the entry of the other ſhould be taken away by the firſt diſcent, and therefore he ſhould not enter with the heir of *A.*

But here in the Caſe of *Littleton*, if after the diſcent the other Joyntenant had died, and the Infant ſurvived, ſome ſay that he ſhould have entred into the whole, becauſe he is now in Judgment of Law, ſolely in by firſt feoffment, and he claimeth not under the diſcent. *Vide* 35 *Aſſ. p. ultimo.*

**CHAP. XIII.

Of Warranty.

Sect. 697.

A *Communi obſervantia non eſt recedendum: & minime mutanda ſunt quæ certam habent interpretationem.* A Warranty is a Covenant real annexed to Lands or Tenements whereby

whereby a man and his heirs are bound to warrant the ſame, and either upon voucher, or by judgment in a Writ of *Warrant.Cartæ*, to yield other Lands and Tenements to the value of thoſe that ſhall be evicted by a former title, or elſe may be uſed by way of Rebutter, *i.e.* to repel or bar. *Bract. l.2.f.37. & l.5.fo.380, &c. Glanv.l.3.ca.1.2.3. 38E.3.21. 45E.3.18. Fol.365.a.*

Garranter en un ſenſe ſignifie a defender ſon tenant en ſa ſeiſin, & en auter ſenſe ſignifie que ſi il ne defend que le garranty luy ſoit tenue a eſchangee, & de faire ſon gree a la vaillaunce. Brit. fo.197 b.

By the Statute of *Glouceſter*, four things are enacted.

1. That if a Tenant by the Curteſie alien with warranty and dieth, that this ſhould be no bar to the heir in a Writ of *Mordanc.* without aſſets in fee-ſimple; and if Lands or Tenements deſcend to the heir from the Father, he ſhall be barred having regard to the value thereof.

2. That if the heir for want of Aſſets &c. doth recover the Lands of his Mother by force of this Act, and afterwards Aſſets diſcend, &c.

3. That the iſſue of the Son ſhall recover by a Writ of Coſinage, Aiel and Beſaiel; and laſtly, that the heir of the wife, after the death of the Father and Mother, ſhall not be barred of his action to demand the heritage of his Mother by Writ of Entry, which his Father aliened in time of his Mother, whereof no Fine was levied in the Kings Court. *Fi. 365.b.*

Concerning the firſt, there be two points in Law to obſerved.

1. Albeit the Statute in this Article name a Writ of *Mordan.* and after Writs of Coſinage, &c. yet a writ of Right, a Formedon, a writ of Entry *ad Com.legem*, and all other like actions are within the purview of this Statute.

*2. Where it is ſaid in the ſaid Act (if the Tenant by the Curteſie alien) yet his releaſe with warranty to a diſſeiſor, &c. is within the purview of the Statute, for that it is in equal mif-

miſchief. 11 *E.2.gar.*83.4 *E.3.gar.*63 *Pl. Cam.*110.*27 *E.3.* 10.14*E.4.gar.5.* and 4*M.Dy.*148.a.

If Tenant by the Curteſie be of a Seigniory, and the Tenancy eſcheat unto him, and after he alien with warranty, this ſhall not bind the iſſue, unleſs aſſets deſcend, for it is in equal miſchief, 22 Aſſ.9.& 37. *temps.i.e.gar.*86.

Note a diverſity between a warranty on the part of the Mother and an eſtoppel; for an eſtoppel, &c. ſhall not bind the heir, when he claimeth from the Father: As if Lands be given to the husband and wife, and to the heirs of the husband, the husband make a gift in Tail and dieth, the wife recover in a *Cui* in *vita* againſt the donee, ſuppoſing that ſhe had fee-ſimple, and make a feoffement and dieth, the donee dyeth without iſſue, the iſſue of the husband and wife bring a Formedon in the Reverter againſt the Feoffee, and notwithſtanding he was heir to the Eſtoppel, and the Mother was Eſtopped, yet for that he claimed the Land as heir to his father, he was not Eſtopped. 18 *E.*3.9.

If a feme heir of a diſſeiſor infeoffe me with warranty, and marrieth with the diſſeiſee, if after the diſſeiſee bring a *Præcipe* againſt me, I ſhall rebut him in reſpect of the warranty of his wife, and yet he demandeth the Land in another right; and ſo if the husband and wife demand the right of the wife, a warranty of the Collateral Anceſtor of the husband ſhall barre 21*R.*2. judgment. 763.

By the Statute of 11 *P.7.c.*20. where the woman hath any eſtate for life of the inheritance, or purchaſe of her husband, or given to her by any of the Anceſtors of the husband, or by any other perſon ſeiſed to the uſe of her husband, or of any of his Anceſtors, there her alienation, releaſe, or confirmation with warranty, ſhall not bind the heir. *l.* 1 *f.* 176. *l.* 3. 50, 51. 59. 60. 61. 62. *Dy.*146. 362 *D. & St.* 55 *Pl. Com.* 56.

I will only adde two caſes, the one was, A man ſeiſed of Lands in fee, levyed a fine to the uſe of himſelf for life, and after to the uſe of his wife, and of the heirs males of her body by him begotten for her joynture, and had iſſue male, and

and after he and his wife, levied fine, and ſuffered a Common recovery, the husband and wife die, and the iſſue male enter by force of the ſaid Statute of 11 *H.* 7. and it was holden by the Juſtices of Aſſ. that the entry, &c. was lawful, and yet this caſe is out of the letter of the Statute, for ſhe neither levied the Fine, &c. Being ſole, or with any other after taken husband, but is by her ſelf with her husband that made the joynture. *Sed qui hæret in littera hæret in Cortice*, & this caſe being in the ſame miſchief, is therefore within the remedy of the Statute, by the entendment of the makers of the ſame, to avoid the diſheriſon of heirs, who were provided by the ſaid joynture, and eſpecially by the husband himſelf, that made the joynture. *M.* 13 *Jac. inter* Harley, *and* Weſt *in eject. fir. in Com. B. Linc.*

The other was. A man is ſeiſed of Lands in the right of his wife, and they two levy a Fine, and the Conuſee grant, and render the Land to the husband and wife in eſpecial tail, the remainder to the right heirs of the wife, they have iſſure, the husband dies, the wife taketh another husband; and they two levy a Fine in Fee, and the iſſue enter, this is directly within the Letter of the Statute, and yet is out of the meaning, becauſe the State of the Land moved from the wife, ſo as it was the purchaſe of the Husband in Letter, and not in meaning. *P.* 17 *El. in Com. B Lattons* Caſe.

But where the woman is Tenant for life, by the gift or conveyance of any other, her alienation with warranty ſhall bind the heir at this day. So if a man be Tenant for life (otherwiſe than as Tenant *per Courteſie*) and alien in fee with warranty and dieth, this ſhall at this day bind the heir, that hath the reverſion or remainder by the Common Law, not holpen by any Statute. But all this is to be underſtood, unleſs the heir that hath the reverſion or remainder, doth avoid the eſtate ſo aliened in the life of the Anceſtor, for then the eſtate being avoided; the warranty being annexed unto the eſtate is voided alſo, *Sect.* 725.

As to the ſecond clauſe of the Statute of *Glouceſtor*, there are two points of Law to be obſerved.

1. That

1. That by the expreſs purview of the Statute, if Aſſets do after deſcend from the Father, then the Tenant ſhall have recovery or reſtitution of the lands of the Mother. But in a Formedon, if at the time of the warranty pleaded, no Aſſets be deſcended whereby the Demandant recovereth, if after the Aſſets deſcend, there the Tenant ſhall have a *Sc. fac.* for the Aſſets, and not for the land intailed; becauſe that if in this caſe the Tenant ſhould be reſtored to the land intailed, then if the iſſue in Tail alienated the Aſſets, his iſſue ſhould recover in a Formedon, *Pl.Com.* 110.*a.l.*8.*f.*53.*Sims* Caſe.

2. Note, That after Aſſets deſcended, the recovery ſhall be by writ of Judgment (*viz.* by *Sc. fac.*) which ſhall iſſue out of the Roll of the Juſtices, &c. (to reſummon him that ought to warrant, &c.) Alſo if the Tenant will have benefit of the Statute, he muſt plead the Warranty, and acknowledge the Title of the Demandant, and pray that the advantage of the Statute may be ſaved unto him; and then if after Aſſets deſcend, the Tenant upon this Record ſhall have a *ſc. fac*, and if Aſſets deſcend but for part, he ſhall have a *ſc. fac.* for ſo much, *l.*8.*fo.* 134, *Mary Shipleys* Caſe.

But if the Tenant plead the Warranty, and Aſſets deſcended, &c. and the Demandant taketh iſſue that Aſſets not, &c. which iſſue is found for the Demandant, whereupon he recovereth, the Tenant albeit Aſſets do after deſcend, ſhall never have a *ſcire fac.* upon the ſaid Judgment, for that by his falſe plea he hath loſt the benefit of the ſaid Statute *fol.* 366.*a.*

Touching the third, ſufficient hath been ſpoken before.

For the laſt; *Nota*, That if the husband be ſeized of lands in right of his wife, and maketh a Feoffment in fee with Warranty, the wife dieth, and the husband dieth, this Warranty ſhall not bind the heir of the wife without Aſſets, albeit the husband be not Tenant by the Courteſie, 8 *E.*2.*gar.* 11.18 *E.*3.51.

A Warranty may not only be annexed to freeholds, or inheritance corporeal, which paſs by Livery, as houſes and lands,

lands, but alſo to Freeholds or Inheritances incorporeal, which lie in grant, as Advowſons, and to Rents, Commons, Eſtovers &c. which iſſue out of Lands or Tenements, and not only to Inheritances in *eſſe*, but alſo to Rents, Commons, &c. newly created. As if a man (ſome ſay) may grant a Rent, &c. out of Land for life in tail or in fee with Warranty; for although there can be no Title precedent to the Rent, yet there may be a Title precedent to the Land, out of which it iſſueth before the grant of the Rent, which Rent may be avoided by the recovery of the land, in which caſe the grantee may help himſelf by a *Warrantia Cartæ*, upon the eſpecial matter, and ſo a Warranty in Law may extend to a Rent, &c. newly created; and therefore if a Rent newly created be granted in exchange for an acre of land; this exchange is good, and every exchange implieth a Warranty in Law: and ſo a Rent newly created may be granted for owelty of partition. 2*H.*4.13.30*H.*8.*Dyer* 42. *Temps E.*1. *Admeaſurement* 16.32*E.*1.*Vouch.*294.30*E.*1.*Exch.*16.9*E.*4.15.15*E.*4.29*Aſſ.*13.

A man ſeiſed of a rent-ſeck iſſuing out of the Manor of D. taketh a wife, the husband releaſeth to the Terre-tenant, and warranteth *Tenementa prædicta*, and dieth, the wife bringeth a Writ of Dower of the rent, the Terre-tenant ſhall vouch for that albeit the releaſe enured by way of Extinguiſhment, yet the Warranty extended to it, and by Warranty of the land, all rents, &c. iſſuing out of the land that are ſuſpended or diſcharged at the time of the Warranty created, are warranted alſo. *Vide Sect.* 741.45*E.*3.*Vouch.*72. 9*E.*3.78. 18*E.*3.55.30*E.*3.30.2*H.*7.9.3*H.*7.4.7*H.*7.17.10*E.*4.9.*b.*21*E.*4.26. 14*H.*8.6.30*H.*8.*Dyer* 42.

Sect. 698. *Fo.* 366.*b.*

A Warranty that commenceth by diſſeiſin is ſo called, because regularly the Conveyance whereunto the Warranty is annexed doth work a diſſeiſin. The Examples that *Littleton* putteth of this kind of Warranty have four qualities:

1. That the diſſeiſin is done immediately to the heir that

is to be bound, *l.* 5. *fo.* 79. *Fitzh. c.* and yet if one brother make a gift in tail to another, and the Uncle diſſeiſe the Donee, and infeoff another with Warranty, the Uncle dieth, and the Warranty deſcend upon the Donee, and then the Donee dieth without iſſue, albeit the diſſeiſin was done to the Donee, and not to the Donor, yet the Warranty ſhall not bind him, 31 *E.* 3. *garr.* 28. The Father, the Son, and a third perſon are Joyntenants in fee, the Father maketh a Feoffment in fee of the whole with warranty, and dieth, the Son dieth, the third perſon ſhall not * avoid the feoffment * only for his own part, but alſo for the part of the Son, and he ſhall take advantage that the warranty commenced by diſſeiſin, though the diſſeiſin was done to another, *fol.* 367. *a.*

2. That the Warranty and diſſeiſin are *ſimul*, and *ſemel*; and yet if a man commit a diſſeiſin of intent to make the feoffment in fee with Warranty, albeit he make the feoffment many years after the diſſeiſin, yet the Law ſhall adjudge upon the whole matter, and by the intent couple the Diſſeiſin and the Warranty together, 19*H.* 8. 12. *l.* 5. *fo.* 79. *b.*

3. That the Warranty, &c. (if it ſhould bind) ſhould bind as a collateral Warranty, and therefore commencing by diſſeiſin ſhall not bind at all. A leſſee for years may make a feoffment, and a fee-ſimple ſhall paſs, ſo as albeit as to the leſſor it worketh by diſſeiſin, yet between the parties the Warranty annexed to ſuch eſtate ſtandeth good upon which the feoffee may vouch the feoffor or his heirs, as by force of a lineal Warranty. Note, there is a feoffment *de jure*, and a * feoffment *de facto*.

If the Lord be Gardein of the Land, or if the Tenant make a leaſe to the Lord for years, or if the Lord be Tenant by Statute Merchant or Staple, or by Elegit of the Tenancy, and make a feoffment in fee, he hereby doth extinguiſh his Seigniory, although having regard to the leſſor it is a diſſeiſin. *Vide Sect.* 611. *Brit. ca. Diſſeiſin,* 50*E.* 3. 12. *b.* 8*H.* 7. 5. 19*E.* 2. *Aſſ.* 400. 3*E.* 4. 17. 12*E.* 4. 12. 10*E.* 4. 18. *F.N.B.* 201. *l.* 3. *f.* 78. *Fermors* caſe. * *Temps E.* 1. *Counterplea de Vouch.* 126. 50*E.* 3. *ibid.* 124.

The

The 4 quality is a diſſeiſin, but that it is put for an example. For if the Tenant dieth, and an Anceſtor of the Lord enter before the entry of the Lord, and make a feoffment in fee with Warranty, and dieth, this Warranty ſhall not bind the Lord, becauſe it commenceth by wrong, being in nature of an Abatement, *& ſic de ſimilibus.*

Sect. 700. *Fo.*367.*b.*

If the purchaſe were to the Father and the Son, and the heirs of the Son, and the Father maketh a feoffment in fee with Warranty, if the Son enter in the life of the Father, and the feoffee re-enter, the Father dieth, the Son ſhall have an Aſſize of the whole. 13*Aſſ.*8.13*E.*3.*Gar.*24.25.37.22*H.*6. 51.8*H.*7.6.

But if the Son had not entred in the life of the Father, then for the Fathers moity, it had been a bar to the Son, for that therein he had an eſtate for life, and therefore the Warranty as to that moity had been collateral to the Son, and by diſſeiſin for the Sons moity, and ſo a Warranty defeated in part, and ſtand good in part.

If a man of full age, and an Infant make a feoffment in fee with Warranty, it is good for the whole againſt the man of full age, and void againſt the Infant. For albeit the feoffment of an Infant paſſing by livery of ſeiſin be voidable, yet his Warranty which taketh effect only by Deed, is meerly void. *Temps E.*1.*Voucher* 207.39*E.*3.26. *John Londons* Caſe. 14*H.*6.

*Sect.*701. *Fol.*368. *a. b.*

Duo non poſſunt in ſolido rem unam poſſidere. 19*H.*6.23.*b. per Newton.*

If a man hath iſſue two Daughters, Baſtard eigne and Mulier puiſne, and die ſeiſed, and they both enter generally, the ſole poſſeſſion ſhall not be adjudged only in the Mulier, becauſe they both claim by one and the ſame Title, 17*E.*3.59. 11*Aſſ.p.*23.

Barretor,

Barretor, is a common mover, and exciter, or maintainer of ſuits, quarrels, or parts, either in Courts, or elſewhere in the Countrey, *l.* 8. *f.* 36. *b. Caſe de Barretry fo.* 368. *b.*

Extortion in his proper ſenſe is a great miſpriſion by wreſting, or unlawfully takeing by any Officer, by colour of his Office, any money or thing valuable, of, or from any man, *qd, non eſt debitum, vel quod eſt ultra debit', vel ante tempus quod eſt debitum*, *Pl.Com.* 64. *l.* 10. 10. 1. *Beaufages* Caſe, *W.* 1. *c.* 26. *&t W.* 1. *c.* 10. 42 *E.* 3. 5. 27. *Aſſ.* 14. *Pl.Com.* 68.

Robbery is apparent, and hath the face of a Crime: but Extortion puts on the viſure of vertue, for expedition of Juſtice, &c and it is ever accompanied with that grievous ſin of Perjury, *Pl. Com. Dive* and *Mannings* Caſe. But largely, Extortion is taken for any Oppreſſion by extort power, or by colour or pretence of Right; and ſo *Littleton* taketh it in this place, 7 *E.* 4. 21.

Manutenentia, ſignifies a taking in hand, bearing up, or upholding of quarrels and ſides, to the diſturbance or hinderance of Common Right, 1 *E.* 3. *c.* 14. 20 *E.* 3. *c.* 4, 5.

By the Statute of 1 *R.* 2. *c.* 9. it is enacted, That feoffments made for maintenance, ſhall be holden for none, and of no value, ſo as *Littleton* putteth his caſe at the Common Law; for he ſeemeth to allow the feoffment, where he ſaith *tiel feoffment fuit le cauſe, &c.*

But ſome have ſaid, That the feoffment is not void between the feoffor and the feoffee, but to him that right hath.

Now ſince *Littleton* wrote, there is a notable Statute 32 *H* 8. *c.* 9. made in ſuppreſſion of the cauſes of unlawful maintenance, the effect of which Statute is:

1. That no perſon ſhall bargain, buy, ſell, or obtain any pretenced Rights or Titles.

2. Or take, promiſe grant, or Covenant to have any Right or Title of any perſon, in, or to any Lands, &c. but if ſuch perſon which ſhall ſo bargain, &c. their Anceſtors, or they by whom he or they claim the ſame, have been in poſſeſſion of the ſame, or of the reverſion, or remainder thereof, or

taken the * rents or profits thereof by the ſpace of one whole year, &c. upon pain to forfeit the whole value of the lands, &c. and the buyer or taker &c. knowing the ſame, to forfeit alſo the value. * Thoſe words are but explanatory, and put for example &c.

3. Provided that it ſhall be lawful for any perſon being in lawful poſſeſſion, &c. to obtain or get the pretenced Right or Title &c.

Nota, That Title or Right may be pretenced two manner of ways:

1. When it is meerly in pretence or ſuppoſition, and nothing in verity.

2. When it is a good Right or Title in verity, and made pretenced by the act of the party, and both theſe are within the ſaid Statute: For example,

If *A.* be lawful owner of land and is in poſſeſſion, *B.* that hath no right thereunto grant to *A.* or contracteth for the land with another, the grantor and the grantee (albeit the grant be meerly void) are within the danger of the Statute, for *B.* hath no right at all but only in pretence.

If *A.* be diſſeiſed in this caſe, *A.* hath a good lawful right, yet if *A.* being out of poſſeſſion, grant to, or contracteth for the land with another, he hath made now his good right of Entry pretenced within the Statute, and both the grantor and the grantee within the danger thereof. *A fortiori* of a right of Action, *quod nota*, *Pl. Com.* 80, *&c. Partridges* Caſe.

It is further to be known, That a Right or Title may be conſidered three manner of ways:

1. As it is naked and without poſſeſſion.

2. When the abſolute Right cometh by releaſe or otherwiſe to a wrongful poſſeſſion, and no third perſon hath either *jus proprietatis*, or *jus poſſeſſionis*.

3. When he hath a good right and a wrongful poſſeſſion. As to the firſt ſomewhat hath been ſaid. As to the ſecond, taking the former example, If *A.* be diſſeiſed, and the diſſeiſee releaſe unto him, he may preſently ſell, grant or contract

tract for the land, and need not tarry a year; for it is a rule upon this Statute, that whoſoever hath the abſolute ownerſhip of any Land, Tenements or Hereditaments (as in this caſe the diſſeiſor hath) there ſuch owner may at his pleaſure bargain grant, or contract for the land; for no perſon can thereby be prejudiced or grieved, *6 E. 6. Br. Maintenance* 38.

And ſo if a man Morgage his Land, and after redeem the ſame, or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargain, &c.

As to the third, if in the caſe aforeſaid the diſſeiſor dieth ſeiſed, and *A.* the diſſeiſee enter, and diſſeiſe the heir of the diſſeiſor, albeit he hath an ancient right, yet ſeeing the poſſeſſion is unlawful, if he bargain or contract for the land before he hath been in poſſeſſion, by the ſpace of a year, he is within the danger of the Statute; becauſe the heir of the diſſeiſor hath right to the poſſeſſion; and he is thereby grieved, *& ſic de ſimilibus.*

A Leaſe for years is within the Statute, for the Statute ſaith not (the right, but any right) and the offendor ſhall forfeit the whole value of the Land. 23 *Eliz. Dyer* 374. *Pl. Com. Fo.* 87.

But yet if a man make a Leaſe for years to another, to the intent to try the Title in an *Eject. fir.* that is out of the Statute, becauſe it is a kind of courſe of Law, but if it be made to a great man, or any other to ſway or countenance the cauſe, that is in this Statute. *M.* 30 *&* 31 *El.* 28. 11. *inter Finch* and *Cocham in C.B. Fo.* 369. *b.*

A Cuſtomary right, or a pretence thereof to lands holden by Copy is within this Statute, *l. 4. fo.* 26. *Copihold caſe.*

If there be Tenant for life, the remainder in fee by lawful and juſt title, he in the remainder may obtain and get the pretenced right or title of any ſtranger, not only for that the particular eſtate, and the remainder are all one, but for that it is a mean to extinguiſh the ſeeds of troubles and ſuits, and cannot be to the prejudice of any, 34 *H.* 8. *Dy.* 52.

And where the Statute ſaith (being in lawful poſſeſſion, by taking the yearly rent, &c.) thoſe words are but explana-

tory, and but for example: for howſoever he be lawfully ſeiſed in poſſeſſion, reverſion, or remainder, it ſufficeth, though he never took profit. But the matter obſervable upon this proviſo, is, that if a deſſeiſor make a Leaſe for lives, or years, the remainder for life, in tail, or in fee, he in remainder cannot take a promiſe, or Covenant, that when the diſſeiſee hath entred upon the Land, or recovered the ſame, that then he ſhould convey the Land to any of them in remainder thereby to avoid the particular eſtate, or the intereſt or eſtate of any other; for the words of the proviſo be (buy, obtain, get or have by any reaſonable way or mean) and that is not by promiſe or Covenant, to convey the Land, after entry, or recovery, for that is neither lawful, being againſt the expreſſe purview of the body of the act, and not reaſonable, becauſe is it to the prejudice of a third perſon.

But the reaſonable way or means intended by the ſtatute, is by releaſe or confirmation, or ſuch conveyances as amount to as much.

Sect. 703. *Fo.* 370. *a.*

A Warranty lineal is a Covenant real annexed to the Land by him which either was owner, or might have inherited the Land, and from whom his heir lineal or collateral might by poſſibility have claimed the Land as heir from him that made the warranty.

In a *Jur. utr.* brought by a Parſon of a Church the Collateral Warranty of his Anceſtor is no barre, for that he demands the Land in the right of his Church, in is politick capacity; and the Warranty deſcendeth on him in his natural capacity. 27 *H.* 6. *garr.* 48.

But ſome have holden that if a Parſon bring an Aſſ. that a Collateral warranty of his Anceſtor ſhall bind him, for that the Aſſ. is brought of his poſſeſſion and ſeiſin, and he ſhall recover the meane profits to his own uſe 34 *E.* 3. *garr.* 71.

But ſeeing he is ſeiſed of the freehold, whereof the Aſſ. is brought in *jure Eccleſiæ.* which is in another right then the warranty; it ſeemeth that it ſhould not be any barre in the

Aſſ.

Aſſ. The like Law is of a Biſhop, Archdeacon, Dean, Maſter of an Hoſpital, and the like, of their ſole poſſeſſions, and of the Prebend, Vicar, &c.

King *H.*3. gave a Manor to *Edmond* Earl of *Cornwal*, and to the heirs of his body, ſaving the poſſibility of Reverter, and died. The Earl before the Statute of *W.*2.*c.*1. *de donis Cond.* by Deed gave the ſaid Manor to another in fee with Warranty, in exchange for another Manor; and after the ſaid Statute *Anno* 28 *E.*1. dieth without iſſue, leaving Aſſets in fee-ſimple which is Warranty, and Aſſets deſcended upon King *E.*1. as Couin German, &c. And it was adjudged, that the King as heir to the ſaid Earl *Edmond*, was by the ſaid Warranty and Aſſets barred of the poſſibilty of Reverter, which he had expectant upon the ſaid gift, albeit the Warranty and Aſſets deſcended upon the natural body of King *E.*1. as heir to a Subject, and *E.*1. claimed the ſaid Manor as in his Reverter *in jure Coronæ*, in the capacity of his Body Politick, in which right he was ſeiſed before the gift, 45 *Aſſ.*6. 6*E.*3.5 6.*Pl.Com.*234.& 553,554. *Vide* 27*H.*6.*garr.*40. 34*E.*3.*garr.*71.

In this caſe how by the death of the ſaid Earl *Edmond* without iſſue, the Kings Title by Reverter, and the Warranty and Aſſets came together, and that the Warranty was collateral; yet the King ſhall not be barred without Aſſets, as a Subject ſhall be, and many other things are to be obſerved in this caſe, which the learned Reader will obſerve. *Vide Sect.*711, 712.

*Sect.*704,705.*fol.*371.*a.*

Littleton doth agree with the Authority of our Books, 46*E.*3.6. 5*E.*3.14. 19*H.*8. 12. ſo as the diverſities do ſtand thus: 1. Where the diſſeiſin and feoffment are *uno tempore*, and where at ſeveral times. 2. Where the diſſeiſin is with intent to alien with Warranty, and where the diſſeiſin is made without ſuch intent, and the alienation with Warranty afterwards made.

*Sect.*706. *ibid.*

Upon every Conveyance of lands,&c. as upon Fines, Feoffments,Gifts, &c. Releaſes and Confirmations made to the Tenant of the land, a Warranty may be made, albeit he that makes the Releaſe or Confirmation hath no right to the land,&c. But ſome do hold, that by Releaſes or Confirmations, where there is no eſtate created, or tranſmutation of poſſeſſion, a warranty cannot be made to the Aſſignee; 14*E.* 3.*Voucher* 108.16*E.*3.*ibid.*87. 18*E.*3.6. 12*H.* 7.1.*Vide S.*733, 738,745.

*Sect.*707. *Fol.*371.

The opinion of *Littleton* in this caſe is holden for Law, againſt the opinions in 35*E.*3.*Garr.*73.11*H.*4.33.

*Sect.*708. *Fo.*372.*a.*

Hereby it appeareth, that a Warranty that is collateral in reſpect of ſome perſons, may afterwards become lineal in reſpect of others, 8 *R.* 2. *Garr.* 101. Whereupon it followeth, That a collateral Warranty doth not give a right, but bindeth only a right ſo long as the ſame continueth: but if the collateral Warranty be determined, removed or defeated, the right is revived, 43*Aſſ.*44. 24*H.*8.*tit.Tail,Br.*7*H.*5.6. *tit. Aſſ.* 350.34*E.*3.*Droit* 29.19*H.*6.59.21*H.*7.40. 5*H.*7.29.3*H.*7.9.*b.* And yet in an Aſſize the Plaintiff hath made his Title by a collateral warranty, 16*Aſſ.p.*16.27*Aſſ.*74.29*Aſſ.*50. 43*Aſſ.*8. 14*H.*4.13.19*H.*6.66.

Barre, ſignifieth legally a deſtruction for ever, or taking away for a time of the action of him that right hath.

Nota, That in ſome caſes an eſtate tail may be barred by ſome Acts of Parliament made ſince *Littleton* wrote; and in ſome caſes an eſtate tail cannot be barred, which might when *Littleton* wrote have been barred: For Example: if Tenant in tail levy a Fine with Proclamation according to the Statute, this is a bar to the eſtate tail, but not to him in reverſion or remainder, if he maketh his claim, or purſue his

his action within five years after the estate tail spent, 4 *H.7. c.24.& 33 H.8.c.36.*

If a gift be made to the eldest Son, and to the heirs of his body, the remainder to the Father, and to the heirs of his body, the Father dieth, the eldest Son levieth a Fine with Proclamation, and dieth without issue, this barreth the second Son; for the remainder descended to the eldest, *Dalisons* case, 2 *El.& 7 El.lib.3.f.84.*

If Tenant in tail be disseised, or have a right of action, and the Tenant of the land levy a Fine with Proclamation, and five years pass the right of the estate tail is barred.

If Tenant in tail in possession or that hath a right of entry, be attainted of High Treason, the estate tail is barred, and the land is forfeited to the King; and none of these were bars when *Littleton* wrote. A lineal Warranty and Assets was a bar to the estate tail when *Littleton* wrote, *26 H.8.c.13. 33 H.8. c.20. 5 E.6.c.11. St.pl.Cor.18.*

A Common Recovery with a voucher over, and a Judgment to recover in value, was a bar of the estate tail when *Littleton* wrote, *12 E.4.19. Taltarums* Case.

And of Common Recoveries there be two sorts, *viz.* one with a single Voucher, and another with a double Voucher, and that is more common and more safe; there may be more Vouchers over, *Vid.Sect.690.& vide l.3.f.5. Cuppledicks* case, *& fo.93,97,106 vide post.* **

If the King had made a gift in tail, and the Donee had suffered a Common Recovery, this should have barred the estate tail in *Littletons* time, but not the reversion or remainder in the King. And so if such a donee had levied a Fine with Proclamation after the Statute of *4 H 7.* this had barred the estate tail, although the reversion was in the King, *38 H.8. Tail,Br.41. Pl.Com.fo.555. 29 H.8.Dyer 52.* ***Com.Recoveries, &c. Vide l.1.f.62. Capels* case, *l.2. f.16.52,74,77. l.6.f.41.32. l.10.f.37. Mary Portingtons* case

But since *Littleton* wrote, a Common Recovery had against Tenant in tail of the Kings gift, &c. is no bar, &c. by the Statute of *34 H.8.c.20.*

And where the words of the Statute be (Whereof the reverſion or remainder at the time of ſuch recovery had, ſhall be in the King) theſe ten things are to be obſerved upon the conſtruction of that Act.

1. That the eſtate Tail muſt be created by a King, and not by any Subject.

2. The King muſt have the reverſion at the time of the Recovery.

3. The reverſion or remainder cannot be barred, but where the eſtate Tail in poſſeſſion is barred, *l.* 8. *f.* 77. 78. Seignieur *Stafforde* caſe.

4. If a Subject make a gift in Tail, the remainder to the King in fee, the eſtate Tail may be barred by a Common Recovery, *cauſa patet. l.* 2. *f.* 52. *Cholmleys* caſe.

5. So it is if the King had the remainder by diſcent.

6. The word (*Reverſion*) in the body of the Act hath reference to theſe words (*given or granted*) and (*Remainder*) hath reference to theſe words (*otherwiſe provided.*) As if the King in conſideration of mony, or of Aſſurance of Land, or for other conſiderations, by way of proviſion, procure a Subject by Deed indented and inrolled, to make a gift in Tail to one of his Servants and Subjects, for recompence of ſervice or other conſideration, the remainder to the King in fee, and all this appear of Record; this is a good proviſion within the Statute; and the Tenant in Tail cannot by a Common Recovery barre the eſtate Tail. So it is if the remainder be limited to the King in Tail; but if it be limited for years, or for life, it is otherwiſe. *Lib.* 2. *fol.* 16. *Wiſemans* caſe.

7. Where a Common Recovery cannot barre the eſtate Tail by force of the ſaid Statute, there a Fine levied in Fee, in Tail, for lives, for years, with proclamation according to the Statute, ſhall not barre the eſtate Tail, or in the iſſue in Tail, where the reverſion or remainder is in the King, by reaſon of theſe words in the ſaid act (The ſaid Recovery, or any other thing or things hereafter to be had, done or ſuffered by, or againſt any ſuch Tenant in Tail, to the contrary not-

notwithſtanding) which words include a Fine levied by ſuch a donee and reſtraineth the ſame, *P.31 Eliz. Rot. 1645. Notleys* caſe, C. B.

8. But where a Common Recovery ſhall bar the eſtate Tail notwithſtanding that Statute, there a Fine with Proclamation ſhall bar the ſame alſo.

9. Where the ſaid latter words of the Statute be (Had, done or ſuffered, by, or againſt any ſuch Tenant in Tail) the ſenſe and conſtruction is, where Tenant in Tail is party or privy to the Act be it by doing or ſuffering that which ſhould work the bar, and not by meer permiſſion, he being a ſtranger to the Act.

10. Albeit the Preamble of the Statute extends only to gifts in Tail made by the Kings of *England* before the Act (*viz.* hath given and granted, &c.) and the body of the Act referreth to the preamble (*viz.* that no ſuch fained Recovery hereafter to be had againſt ſuch Tenant in Tail) ſo as this word (ſuch) may ſeem to couple the body and the Preamble together; yet in this caſe (ſuch) ſhall be taken for ſuch in equal miſchief, or in like caſe; and by divers parts of the Act it appeareth, That the makers of the Act intended to extend it to future gifts, and ſo is the Law taken at this day.

A Recovery in a Writ of Right againſt Tenant in Tail without a Voucher, is no barr of any gift in Tail.

If Tenant in Tail, the remainder over in fee *ceſſe*, and the Lord recover in a *Ceſſavit*, this ſhall not barre the eſtate Tail, for the iſſue ſhall recover in a *Formedon*: neither were either of theſe barrs when *Littleton* wrote, 3. *E.* 3. *Judgment* 252. 3 *H.* 6. 55. 10 *H.* 6. 5. 14. 14 *E.* 4. 5. *b.* 15 *E.* 4. 8. *F.N.B.* 134. *b. Pl. Com.* 237. 28 *E.* 3. 95. *F.N.B.* 28. *I.*

Sect. 702. *Fol.* 373. *b.*

Nemo præſumitur alienam poſteritatem ſuæ prætuliſſe

If a man that is innocent be accuſed of Felony, and it be found that he fled for the Felony, he ſhall forfeit all his goods and chattels, debts and duties, 3 *E. Corone Staunf.*

But yet the general Rule is, *Quod ſtabitur præſumptio donec probetur in contrarium*, Bract. l. 1. c. 9.

It hath been attempted in Parliament, that a Statute might be made, That no man ſhould be barred by a Warranty collateral, but where Aſſets deſcended from the ſame Anceſtor; but it never took effect, for that it ſhould weaken common Aſſurances, *Rot. Parl.* 50 *E.* 3. *num.* 77.

Sect. 710, 711, 712.

If husband and wife Tenants in eſpecial tail have iſſue a daughter, and the wife die, the husband by a ſecond wife hath iſſue another daughter, and diſcontinueth in fee and dieth, a collateral Anceſtor of the daughters releaſeth to the diſcontinuee with Warranty, and dieth, the Warranty deſcendeth upon both daughters, yet the iſſue in tail ſhall be barred of the whole, for in judgment of Law the entire Warranty deſcendeth upon both of them, 5 *E.* 2. *Garr.* 78. *l.* 8. *fo.* 41. *Sims* Caſe.

Here note, That when one Coparcener doth generally enter into the whole, this doth not deveſt the eſtate which deſcended by Law to the other, unleſs ſhe that enter, claimeth the whole, and taketh the profits of the whole. *Vide Sect.* 398.

Otherwiſe it is after the parceners be actually ſeiſed, the taking of the whole profits, or any claim made by the one, cannot put the other out of poſſeſſion without an actual putting out of diſſeiſin. And in this caſe of *Littleton*, when one Coparcener entreth into the whole, and maketh a Feoffment of the whole, this deveſteth the Freehold in Law out of the other Coparcener.

Item, when the one ſiſter enters into the whole, the poſſeſſion being void, and maketh a feoffment in fee, this act ſubſequent doth ſo explain the entry precedent into the whole, that now by conſtruction of Law ſhe was only ſeiſed of the whole, and this feoffment can be no diſſeiſin, becauſe the other ſiſter was never ſeiſed, nor any abatement, becauſe they both made but one heir to the Anceſtor, and one Free-

hold

hold and inheritance deſcended to them, ſo as in judgment of Law the Warranty doth not commence by diſſeiſin, or by abatement, and without queſtion her entry was no intruſion, *Pl.Com.*543.*fo.*374.*a.*

Tenant in tail hath iſſue two daughters, and diſcontinues in fee, the youngeſt diſſeiſeth the diſcontinuee to the uſe of her ſelf and her ſiſter; the diſcontinuee outſeth her, againſt whom ſhe recovereth in an Aſſize, the eldeſt agreeth to the diſſeiſin, as ſhe may, againſt her ſiſter, and become Joyntenant with her. And thus is the book in the 21 *Aſſ.p.*19. to be intended, the caſe being no other in effect: But *A.* diſſeiſeth one to the uſe of himſelf and *B.* agreeth, by this he is Joyntenant with *A Fol.*347.*b.*

Nota, In theſe two laſt Sections are ſeveral Concluſions.

1. That a lineal Warranty doth bind the right of a fee-ſimple.

2. That a lineal Warranty doth not bind the right of an eſtate tail, for that is reſtrained by the Statute of *donis Cond.*

3. That a lineal Warranty and Aſſets is a bar of the right in tail, and is not reſtrained by the ſaid Act.

4. That a collateral Warranty made by a collateral Anceſtor of the donee, doth bind the right of an eſtate tail, albeit there be no Aſſets; and the reaſon thereof is upon the Statute of *Donis Cond'*, for that it is not made by the Tenant in tail, &c. as the lineal Warranty is, 3*E.*3.22. 4*E.*3.28.50.*M.* 38*E.*3.*Cor.Rege, Ab.de Colcheſt.* caſe, 45 *Aſſ.*5. *Pl.Com.*554. 19 *E.*4.10. *Vide S* 703, 747.

To this may be added, That the Warranty of the Donee in tail, which is collateral to the Donor, or to him in remainder, being heir to him, doth bind them without any Aſſets. For though the alienation of the Donee after iſſue doth not bar the Donor, which was the miſchief provided for by the Act, yet the Warranty being collateral, doth bar both of them, for the Act reſtraineth not that Warranty, but it remaineth at the Common Law, as *Littleton*

after

after faith. And in like manner the Warranty of the Donee doth bar him in remainder.

Note, Aſſets requiſite to make lineal Warranty a bar, muſt have ſix qualities.

1. It muſt be Aſſets (*i. e.*) of equal value, or more at the time of the diſcent.

2. It muſt be of diſcent, and not by purchaſe or gift

3. It muſt be Aſſets in fee-ſimple and not in fee-tail, or for another mans life.

4. It muſt deſcend to him as heir to the ſame Anceſtor, that made the Warranty, *Brit.* 185. 4*E.* 3. *garr.* 63. 16*E.* 3. *Aſſ.* 4. 43*E.* 3. 9. 7*H.* 6. 3. 11 *H.* 4. 20.

5. It muſt be of Lands, or Tenements, or Rents, or Services valuable, or other profits iſſuing out of Lands, Tenements and not perſonal Inheritances as Annuities &c.

6. It muſt be in ſtate or intereſt, and not in uſe, or right of actions, or right of entry, for they are no Aſſets until they be brought into poſſeſſion, 24*E.* 3. 47.

But if a rent in fee-ſimple iſſuing out of the Land of the heir deſcend unto him, whereby it is extinct, yet this is Aſſets, and to this purpoſe hath in Judgment of Law a Continuance, 31*E.* 3. *Aſſ.* 5. 13*E.* 3. *Recovery in value* 17 *l.* 3. *f.* 31. *Butler* and *Bakers* Caſe.

A Seigniory in frank-Almoign is no Aſſets becauſe it is not valuable and therefore not to be extended; and ſo it ſeemeth of a Seigniory of homage and fealty, 14*E.* 3. *Meſne* 7. *Rog. ſt.* 293.

But an Advowſon is Aſſets whereof *Fleta* l. 2. c. 65. ſaith, *Item de Eccleſiis quæ ad donationem Domini pertinent, quot ſunt, & quæ, & ubi, & quantum valeat quælibet Eccleſia per annum ſecundum veram ipſius æſtimationem, & pro Marca ſolidus extendatur; ut ſi Eccleſia* 100 *Marcas valeat per ann. ad* 100 *ſolidos extendatur advocatio per annum.* Brit. 185. 5 H. 7. 37. 32 H. 6. 21. 33 E. 3. Garr. 102.

Sect.

*Sect.*714. *Fol.*375. *a.*

Nota, That albeit in this caſe the iſſue in tail muſt claim as heir of both their bodies yet the Warranty of either of them is lineal to the iſſue, 35 *E.*3 *garr.*73.

If Lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are diſſeiſed, and the husband releaſeth with Warranty, the wife dieth, and husband dieth, albeit the Donees did take by moities, yet the Warranty is lineal for the whole, becauſe, as our Author here ſaith, the iſſue muſt in a Formedon convey to him the right as heir to the Father and his Mother of their two bodies ingendred, and therefore it is collateral for no part.

*Sect.*715,716,717.

Nunquam nimis dicitur, quod nunquam ſatis diſcitur.

And here it appeareth, That it is not adjudged in Law a collateral Warranty, in reſpect of the blood, for the Warranty may be collateral, albeit the blood be lineal, and the Warranty may be lineal, albeit the blood be collateral. But it is in Law deemed a collateral Warranty, in reſpect that he that maketh the Warranty is collateral to the Title of him upon whom the Warranty doth fall, 8*R.*2. *garr.*101. *vide Sect.*704.

Sect. 718. *Fol.* 376. *a.*

Every Warranty doth deſcend upon him that is heir to him that made the Warranty at the Common Law. *Vide Sect.* 3. 603,735,736,737.

Hereupon many things worthy to be known, are to be underſtood. 1. That if a man infeoff another of an acre of ground with Warranty, and hath iſſue two Sons, and dieth ſeiſed of another acre of Land of the nature of Borough-Engliſh, the feoffee is impleaded; albeit the Warranty deſcendeth only upon the eldeſt, yet may he vouch them both; the one as the heir to the Warranty, and the other as heir to the

the Land, 40*E.*3.14. So it is of heirs in Gavelkind, &c. 22 *E.*4.10. And in like ſort the heir at the Common Law, and the heir of the part of the Mother ſhall be vouched, 49 *Aſſ.* 4. 38*E.* 3. 22. But the heir at the Common Law may be vouched alone in both theſe caſes, at the election of the Tenant; *& ſic de ſimilibus.*

Alſo if a man die ſeiſed of certain land in fee, having iſſue a Son and a Daughter by one *ventre*, and a Son by another, the eldeſt Son enters and dieth, the land deſcends to the ſiſter; in this caſe the Warranty deſcendeth on the Son, and he may be vouched as heir, and the ſiſter as heir of the land.

In which caſe, and in the other caſe of Borough Engliſh, the Son and heir by the Common Law having nothing by diſcent, the whole loſs of the recovery in value, lieth upon the heirs of the land, albeit they be no heirs to the Warranty, 32*E.*3.*Vouch.*94.35*H.*6.3.

Then put the caſe, that there is a Warranty paramount, who ſhall deraign that warranty, and to whom ſhall the recompence in value go? Some have ſaid, that as they are vouched together, ſo ſhall they avouch over, and that the recompence in value ſhall enure according to the loſs, and that the effect muſt purſue the cauſe, as a recovery in value by a Warranty of the part of the Mother ſhall go to the heir of part of the Mother, &c. *Pl.Com.*515.

Some others hold, that it is againſt the maxim of the Law, that they that are not heirs to the Warranty ſhould joyn in a Voucher, or to take benefit of the warranty which deſcends not to them, but that the heir at the Common Law, to whom the Warranty deſcended, ſhall deraign the Warranty, and recover in value, and that this doth ſtand with the rule of the Common Law.

Others hold the contrary, and that this ſhould be both againſt the rule of Law, and againſt reaſon alſo; for by the rule of Law the Vouchee ſhall never ſue to have execution in value, until execution be ſued againſt him. But in this caſe execution can never be ſued againſt the heir at the Common Law

Law, therefore he cannot ſue to have execution over in value. Secondly it ſhould be againſt reaſon, that the heir at the Common Law ſhould have *totum lucrum*, and the eſpecial heirs *totum damnum*. 17*E.*2.*Recover in value* 33.18*E.*3.51. *l.*1.96.*Shelleys* caſe.

I find in our Books this reaſon is yielded, that the ſpecial heirs ſhould not be vouched only; for (ſay they) then could not they deraign the warranty, which ſhould be miſchievous, that they ſhould loſe the benefit of the Warranty, if they ſhould be vouched only. 32*E.*3.*Vouch.*94. *per Green.*

But if the heir at the Common Law were vouched with them (as by the Law he ought) all might be ſaved; and therefore ſtudy well this point, how it may be done.

If Tenant in general tail be, and a common recovery is had againſt him, and his wife, where his wife hath nothing, and they vouch and have judgment to recover in value. Tenant in Tail dieth, and the wife ſurviveth; for that the iſſue in tail had the whole loſs, the recompence ſhall enure wholly to him, and the wife albeit ſhe was party to the judgment, ſhall have nothing in the recompence, for that ſhe loſeth nothing. *Pl.Com.*514.

If the Baſtard eigne enter, and take the profits, he ſhall be vouched only, and not the Baſtard and the Mulier, becauſe the Baſtard is in apparance heir, and ſhall not diſable himſelf. 17*E.*3.59.20*E.*3. *Vouch.*129.5*H.*7.2.

If a man be ſeiſed of Lands in Gavelkind, and hath iſſue three Sons, and by obligation bind himſelf and his heirs, and dieth, an action of debt ſhall be maintenable againſt all the three Sons, for the heir is not chargeable unleſs he hath lands by diſcent. 11*H.*7.12. 11*E.*3.*Dett.*7.*Dy.*5*El.*238.

So if a man be ſeiſed of Land on the part of his Mother, and bind himſelf and his heirs by Obligation, and dieth, an action of debt ſhall lye againſt the heir on the part of the Mother, without naming the heir at the Common Law; and ſo note a diverſity between a perſonal lyen of a Bond, and a real lyen of a Warranty.

Sect.

*Sect.*719. *Fol.*377. *a.*

Here it appeareth, that whensoever the Ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder, and therefore here the remainder to the heirs females vesteth in the Tenant in tail himself. 24*E.*3.36. 27*E.*3.*Age* 108. 38*E.*3.26.40*E.*3.5.37*H.*8.*Br.Nosme* 1.& 40. & *tit. Done & Rem.* 61.

The issues inheritable must make their claim, either only by Males, or only by Females, so as the Females of the Males or Males of the Females, are wholly excluded, &c. 1*H.*6. 4.*Pl Com.*414.*Vide Sect.*24.

But where the first limitation is to the heirs males, let the limitation be for default of such issue to the heirs of the body of the donee, and then all the issues, be they Females of Males, or Males of Females are inheritable.

If a man give Lands to a man, to have and to hold to him, and the heirs Males of his body, and to him, and to the heirs Females of his body, the estate to the heirs Females is in the remainder, and the daughter shall not inherit any part, so long as there is issue Male.

*Sect.*720.

Nihil simul inventum est & perfectum; & *sæpe viatorem nova non vetus orbita fallit*; and therefore new inventions in Assurances are dangerous. 22*H.*6.33. *l.*6. *f.*42.*b.* Sir *Anthony Mildmays* case.

Non prosunt dominis quæ prosunt omnibus artes: quoniam, In suo quisque negotio hebetior est, quam in alieno. 2 H.4.fo.11. Action sur le case.

*Sect.*721. *Fol.*378. *a.*

Every remainder which cometh by deed ought to vest in him to whom it is limited, when livery of seisin is made to him, that hath the particular estate.

1.*Lit-*

1. *Littleton* ſaith by Deed, becauſe if lands be granted and rendred by Fine for life, the remainder in tail, the remainder in fee, none of theſe remainders are in them in the remainder, until the particular eſtate be executed. 7 *R.* 2. *Scire facias.*

2. That the remainder be in him, &c. at the time of the livery. This is regularly true, but yet it hath divers exceptions. As, where the remainder is to commence upon limitation of time, *viz.* upon the poſſibility of the death of one man before another, which is a common poſſibility. *Pl.Com.Colthirſts* caſe, *fo.*65.29.32*H.*6.*tit.Feoffments*, *&c.*99.27*E.*3.87.12*E.*4.21*H.*7.11.7*H.*4.23.11*H.*4.74.18*H.*8.3.27*H.*8.42.38*E.*3.26.30*Aſſ.*47.6*R.*2.*qu Jur.Dam.*20.

A man letteth lands for life upon condition to have Fee, and warranted the land in *forma prædicta*, afterward the leſſee performeth the conditions whereby the leſſee hath fee, the warranty ſhall extend and increaſe according to the State. And ſo it is in that caſe if the leſſor had died before the performing of the condition, &c. and yet the leſſor himſelf was never bound to the Warranty, but it hath relation from the firſt livery; and by this it appeareth, that a Warranty being a Covenant real executory may extend to an eſtate in *futuro*, having an eſtate, whereupon it may work in the beginning.

But otherwiſe it is, if a man grant a Seigniory for years, upon condition to have fee with Warranty in *forma prædicta*, &c.

And ſo it is, if a man make a leaſe for years, the remainder in fee, and warrant the Land in *forma prædicta*, he in the remainder cannot take benefit of the Warranty, becauſe he is not party to the Deed, and immediately he cannot take, if he were party to the Deed, becauſe he is named after the *Habendum*, and the eſtate for years is not capable of a Warranty.

And ſo it is if Land be given to *A.* and *B.* ſo long as they joyntly together live, the remainder to the right heirs of him that dieth firſt, and warrant the land in *forma prædicta*

dicta, *A.* dieth. his heir ſhall have the Warranty; and yet the remainder veſted not during the life of *A.* for the death of *A.* muſt precede the remainder, and yet ſhall the heir of *A.* have the Land by diſcent.

Sect. 722. *Fo.* 378. *b.*

Si le 1. *fits alienaſt*, *&c.* By the Alienation of the Donee two things are wrought.

1. The Franktenement and fee is in the Alienee

2. The Reverſion is reveſted out of the donor; and therefore by the alienation that transferreth the freehold, and feeſimple to the Alienee, there can no remainder be raiſed and veſted in the ſecond Son. 27 *H.* 8. 24. 6 *R.* 2. *Quid jur. clam.* 23.

Alſo an eſtate of an inheritance in Lands and Tenements cannot ceaſe, or be void before the ſtate be deſeated by entry, then if this remainder ſhould be good, then muſt it give an entry upon the Alienee to him that had no right before, which ſhould be againſt the expreſs rule of Law, *viz.* That an eſtate cannot be given to a ſtranger to avoid a voidable Act.

One Alienation cannot veſt an eſtate of one and the ſame Land to two ſeveral perſons at one time.

If a man ſeiſed of an Advowſon in fee, by his deed grant the next preſentation to *A.* and before the Church become void, by another Deed grant the next preſentation of the ſame Church to *B.* the ſecond grant is void, for *A.* had the ſame granted to him before, and the grantee ſhall not have the ſecond avoidance by conſtruction to have the next avoidance which the grantor might lawfully grant, for the grant of the next avoidance doth not import the ſecond preſentation. But if a man ſeiſed of an Advowſon in fee take wife; now by act in Law is the wife intitled to the third preſentation, if the husband die before: The husband grants the third preſentation to another, the husband die, the heir ſhall preſent twice, the wife ſhall have the third preſentation, and the grantee the fourth; for in this caſe it ſhall be taken

taken the third Preſentation, which he might lawfully grant; and ſo note a diverſity between a Title by act in Law, and by act of the party, for the act in Law ſhall work no prejudice to the grantee.

Periculeſum eſt res novas & inuſitatas inducere.
Eventus varios res nova ſemper habet, vide §. 87. &c.

Sect. 723. *fol.* 379. *a.*

Here by the Opinion of *Littleton,* the Donor may re-enter for the condition broken, for *Utile per inutile non vitiatur,* which being in caſe of a condition, for the defeating of an eſtate, is worthy of Obſervation. And it is to be noted, That after the death of the Donor, the condition deſcendeth to the eldeſt Son, and conſequently his alienation doth extinguiſh the ſame for ever, wherein the weakneſs of this invention appeareth; and therefore *Littleton* here ſaith, That it ſeemeth that the Donor may re-enter, and ſpeaketh nothing of his heirs.

A man hath iſſue two Sons, and maketh a gift in Tail to the eldeſt, the remainder in fee to the puiſne, upon condition that the eldeſt ſhall not make any diſcontinuance with warranty to bar him in the remainder, and if he doth, that then the puiſne Son and his heirs ſhall re-enter; the eldeſt maketh a feoffment in fee with warranty, the Father dieth, the eldeſt Son dieth without iſſue, the puiſne may enter. But if the diſcontinuance had been after the death of the Father, the puiſne could not have entred.

In this caſe four points are to be obſerved:

1. As *Littleton* here ſaith, the entry for the breach of the Condition is given to the Father, and not to the puiſne Son.

2. That by the death of the Father the condition diſcends to the elder Son, and is but ſuſpended, and is revived by the death of the eldeſt Son without iſſue, and deſcendeth to the youngeſt Son, 41 *E.* 3. *vide Sect.* 446.

3. That the feoffment made in the life of the Father, cannot

cannot give away a condition that is collateral, as it may do a right.

4. That a Warranty cannot bind a title of Entry for a condition broken, but if the diſcontinuance had been made after the death of the Father, it had extinguiſht the condition; which caſe is put to open the reaſon of our Authors opinion.

The ancient Judges and Sages of the Law, have ever(as it appeareth in our Books) ſuppreſſed innovations and novelties in the beginning, as ſoon as they have offered to creep up, leſt the quiet of the Commonwealth might be diſturbed. 31 *Ed.*3.*Gager delivery* 5.22.*Aſſ.*12.38*Ed.*3.1.2*H.*4.18,*&c.* And ſo have Acts of Parliament done the like, 1*Ed.*3.*ca.*15.*Stat.*3. 18*Ed.*3.*cap.*1, *&* 6. 4*Hen.*4.*cap.*2. 11*Hen.*6.*cap.*23. 12*Ed.*4. *cap.* 8.*&c.*

*Sect.*726. *Fol.*380.*a.*

Here note this diverſity; If the heir be within age at the time of the diſcent of the Warranty, he may enter and avoid the eſtate either within age, or at any time after his full age, 18*Ed.*4.13.35*Hen.*6.63.28*Aſſ.*28.32*Ed.*3.*Garr.*30. and *Littleton* ſaith well, That the Infant in this caſe may enter upon the Alienee, for if he bring his action againſt him, he ſhall be barred by this Warranty, ſo long as the ſtate whereunto the Warranty is annexed continues, and be not defeated by entry of the heir; but if he be within age at the time of the alienation with Warranty, and become of full age before the diſcent of the Warranty, the Warranty ſhall bar him for ever.

Our Author putteth his caſes where the entry of the Infant is lawful; for where it is not lawful when the Warranty deſcendeth, the Warranty doth bind the Infant, as well as a man of full age; and the reaſon is, becauſe the ſtate whereunto the Warranty was annexed continueth, and cannot be avoided but by action, in which action the Warranty is a bar. And ſo it is of a Feme covert, if her entry be not lawful, a Warranty diſcending on her during the coverture

tare doth bind her: and albeit the husband be within age at the diſcent of the Warranty, yet if the entry of the wife be taken away, the Warranty ſhall bind the wife, 8*Ed.*3.3. 3*H.* 7.9.*Br.tit.War.*54.33*H.*8. *War.Br.*84.*l.*1.*f.*67.*a. Archers* caſe, and 140 *Chudleys* caſe.

Note a diverſity between matters of Record done or ſuffered by an Infant, and matters *in fait*, for matters *in fait* he ſhall avoid either within age or at full age; but matters of Record, as Statute Merchant, Staple, Recognizances knowledged by him, or a Fine levied by him, Recovery againſt him by default in a real action (ſaving in Dower) muſt be avoided by him, *viz.* Statute, &c. by *Audita querela*, and the Fine and Recovery by writ of Error during his minority, and the like; becauſe they are judicial acts, and taken by a Court or a Judge, therefore the nonage of the party, to avoid the ſame, ſhall be tried by inſpection of Judges, and not by the Country, 20*Ed.*3. *Audita querela* 27. *F.N.B.*104.*k.* 6*Ed.*3. 39. 17*Aſſ.*53.17. 21*E.*2.4. 15*E.*4.5. 8*Hen.*6. 30. 1*Hen.*7. 15. 6*Hen.*8.*Saver default, Br.* 50. 3 *Hen.*6.10. 1 *Mar. Dyer* 104.

And for that this Nonage muſt be tried by inſpection, this cannot be done after his full age: But if the age be inſpected by the Judges, and Recorded that he is within age, albeit he come of full age before the Reverſal, yet may it be reverſed after his full age, *P.*13 *Ja. R.* in *Banco Reg. fol.* 380.*b.*

No negligence ſhall be adjudged in an Infant, where he is thereby to be barred of his entry in reſpect of a former right, as by a diſcent, or of his former right (as *Littleton* doth here put an Example) by a Warranty, where his entry is congeable.

But otherwiſe it is of Condition, Charges and Penalties going out of, or depending upon the original Conveyance, for the laches or negligence ſhall be adjudged in thoſe caſes as well in the Infant, as in any other. *Vide Pl.Com.* 355, *&c. Stowels* caſe.

And ſee further there, where an Infant being Tenant for life

life or years, ſhall be puniſhed for doing or ſuffering of waſte; and where he claimeth by purchaſe, a *Ceſſavit* ſhall lie againſt him; if he pay not his rent by two years. And ſome have ſaid, if he have the Tenancy by diſcent, and he himſelf *ceſſe*, a *Ceſſavit* doth lie, and he ſhall not have his age, becauſe it is of his own *ceſſer*, 31 *Ed.*3. *Age* 54. But other Books (as ſome conceive them) be againſt that, *vide* 9 *Ed.*3.50. 28 *Ed.*3.99. 14 *Ed.*3. *Age* 88. 2 *Ed.*2. *Age* 132. and others; which Books do not prove that the *Ceſſavit* doth lie in that caſe, but the contrary, that he ſhall have his age, to the end he may at his full age certainly know what to plead, or what arrerages to tender, for the land was originally charged with the Seigniory and Services, *Sect.*728.**

Note three things concerning the conſtruction of Statutes:

1. That it is the moſt natural and genuine Expoſition of a Statute, to conſtrue one part by another, &c. for that beſt expreſſeth the meaning of the makers, *Pl.Com.*75. 7 *Ed.*3.89. As here the queſtion upon the general words of the Statute is, Whether a Fine levied only by a husband ſeiſed in the right of his wife with Warranty, ſhall bar the heir without Aſſets? And it is well expounded by the former part of the Act, whereby it is Enacted, That Alienation made by Tenant by the Curteſie with Warranty, ſhall not bar the heir, unleſs the Aſſets deſcend, *Bract. lib.*4. *fol.* 321. *Fleta lib.* 5. *cap.*34. And therefore it ſhould be inconvenient to intend the Statute in ſuch manner, as that he that hath nothing but in the right of his wife, ſhould by his Fine levied with Warranty bar the heir without Aſſets: and this Expoſition is *ex viſceribus actus.*

2. The words of an Act of Parliament muſt be taken in a lawful ſenſe, as here the words being (*Whereof no Fine is levied in the Kings Court*) are to be underſtood, whereof no Fine is lawfully or rightfully levied, &c. and therefore a Fine levied by the husband alone, is not within the meaning of the Statute, for that Fine ſhould work a wrong to the wife; but a Fine levied by the husband and wife, is intended by the

the Statute, for that Fine is lawful, and worketh no wrong, *Pl.Com.* 246. *Seignieur Barklays* Caſe, *l.* 9. *fol.* 26. *Abbot de Strata Marc.* and generally the Rule is, *Quod non præſtat impedimentum quod de jure non ſortitur effectum.* Vide fol. 381 *b.* 11 *H.*4. 80.

3. That Conſtructions muſt be made of a Statute in ſuppreſſion of the miſchief, and in advancement of the remedy, as by this caſe it appeareth. For a Fine levied by the husband only, is within the letter of the Law; but the miſchief was, the heir was barred of the Inheritance of his Mother, by the warranty of his Father without Aſſets: and this Act intended to apply a remedy, *viz.* That it ſhould not bar unleſs there were Aſſets, and therefore the miſchief is to be ſuppreſſed, and the remedy advanced, *Et qui hæret in littera, hæret in Cortice.*

Sect. 731. *Fo* 383. *a.*

Nullius hominis auteritas tantum apud nos valere debet, ut melicra non ſequerentur, ſi quis attulerit, 8 *E.*2. *Gar.* 81. 18 *E.*3. 51. 7 *E.* 3. 84. *Pl.Com.* 57.

The Judge if he knoweth it, ought not to take knowledge of a Fine, that worketh a wrong to a third perſon, 33 *H.*6. 52. 5 *E.*3. 56. 2 *El.Dyer* 178. 1 *H.*8. 1. *M.* 89. 4 *E.* 3. 41. 7 *El.Dyer* 246.

Sect. 733. *Fo.* 383 *a.*

The feoffor may by expreſs words warrant the land for the life of the feoffee, or of the feoffor, &c. but the Recovery in value ſhall be in fee, 38 *E.*3. 14.

Et ego & hæredes mei Warrantiz. tali & hæred. ſuis tantum, vel tali & hæred. aſſign. & hæred. aſſignatorum, vel aſſig. aſſignator. & eorum hæred. & acquietabimus, & defendemus, &c. Bract. fo 37. 247. & l. 5 380, 381. Brit. 106.

Per hoc autem quod dicit (acquietabimus) obligat ſe & hæred. ſuos ad acquietand' ſi quis plus petierit ſervitii vel aliud ſervitium quam in carta Donatricis continetur. Per hoc autem quod dicit (Defendemus) obligat ſe & hæredes ſuos ad defend.

ſi

ſi quis velit ſervitutem ponere rei datæ contra formam ſuæ donationis.

If a man be bound to *A.* in an Obligation to defend ſuch Lands to *A.* whereof the Obligor hath infeoffed him for 12 years, &c. in this caſe, if he be ouſted by a ſtranger without being impleaded, the Obligation is forfeit: But if he be bound to warrant the land, &c. the bond is not forfeit unleſs the Obligee is impleaded, and then the Obligor muſt be ready to warrant, &c. 2*E.*4.15. *tit.Det.* 71. *Qui benè diſtinguit, benè docet*, fol. 384.*a.*

A Warranty in Deed is created only by this word *Warrantizo*, but Warranties in Law are created by many other words; they are therefore called Warranties in Law, becauſe in Judgment of Law they amount to a Warranty without this Verb *Warrantizo.*

As *Dedi* is a Warranty in Law to the feoffee and his heirs during the life of the feoffor, but *Conceſſi* in a Feoffment or Fine implieth no Warranty.

But before the Statute of *Quia Emp. ter.* if a man had given lands by this word *Dedi*, to have and to hold to him and his heirs of the Donor and his heirs, by certain Services, then not only the Donor, but his heirs alſo had been bound to warrant.

But if before the Statute a man had given lands by this word *Dedi*, to a man and his heirs for ever, to hold of the chief Lord, there the Feoffor had not been bound to Warranty but during his life, as at this day he is. *Leſtat.de Bigamis c.*6. 2*H.* 7.7. 6*H.*7.2. 48*E.*3.2.31*E.*1.*Vouch.*290. *F.N.B.*134.*b.* 6*E.*2. *Vouch.*258.

Dedi, doth import a Warranty in Law, albeit there be an expreſs Warranty in the Deed. For if a man make a feoffment by *Dedi*, and in the Deed doth warrant the land againſt *I.S.* and his heirs, yet *Dedi* is a general Warranty during the life of the feoffor, and ſo was the Statute expounded in both points. *H.* 14 *El. in Com.Banc.* And if a man make a leaſe for life reſerving a Rent, and add an expreſs Warranty, here the expreſs Warranty doth not take away

away the Warranty in Law, for he hath election to vouch by force of either of them: and in *Nokes* Caſe, note a diverſity between a Warranty, that is a Covenant, and a warranty concerning a Chattel, *l.*4.*fo.*80.8*E.*3.69. 3*E.*3. *Formedon* 44.

Alſo this word *excambium* doth imply a Warranty. Alſo a Petition implieth a warranty in Law; and homage Aunc' doth draw to it ſelf warranty. 4*E.* 2. *Vouch.* 245. 22 *E.*3. 3. 14*H.*6.2.20*H.*6.14. *l.*4.122. *l.*1.96.*l.*5.*fo.*17.*l.*8.75. Seignior *Staf.* Caſe.

And note that the Warranty wrought by this word *dedi*, is a ſpecial warranty, and extends to the heirs of the Feoffee during the life of the donor only. But upon the exchange & *Homage Aunc'.* the warranty extending reciprocally to the heirs, and againſt the heirs of both parties: and in none of theſe caſes, the Aſſignee ſhall vouch by force of any o theſe warranties; but in the caſe of the exchange and *dedi*, the Aſſignee ſhall rebutt, but not in the caſe of Homage Auncetrel.

And ſo no man ſhall have a writ of *contra formam collationis*, but only of the feoffee and his heirs, which be privy to the Deed; but an Aſſignee may rebutt, by force of the Deed 28 *Aſſ.*33.14 *H.*4.5.11 *E.*3. *Avowr.* 10. 30 *H.*6.7. 33 *H.*8.*Dy.*51.10 *H.*7.11.*b.F.N.B*, 163.*a.*

If a man make a gift in Tail, or a Leaſe for life of land, by deed, or without deed, reſerving a rent, of a rent ſervice by deed, this is a warranty in Law, and the donee, or leſſee being impleaded ſhall vouch, and recover in value, and this Warranty extendeth not only againſt the donor, or leſſor, and his heirs, but alſo againſt his Aſſignees of the reverſion, and ſo likewiſe the Aſſignee of leſſee for life ſhall take benefit of this Warranty in Law. 6*E.*2. *Vouch.* 105. 5*E.* 3.67.3*H.*7.13.6*H.*7.2.7*E.*3.6.*F.N.B.*134.*g.*

When dower is aſſigned, there is a Warranty in Law included, that the Tenant in Dower being impleaded, ſhall vouch and recover in value a third part of two parts, whereof ſhe is dowable. 4*E.*3.36. 43*Aſſ.*32. 50*E.*3.7. *F.N.B.*149.*m.*

A warranty in Law, and Aſſets is in ſome caſes a good bar. In a Formedon in the diſcender the Tenant may plead, that the Anceſtor of the demandant exchanged the Land with the Tenant for other Lands taken in exchange, which deſcended to the demandant, whereunto he hath entred and agreed; or if he hath not entred, and agreed unto the lands taken in exchange, then the Tenant may plead the warranty in Law, and other Aſſets diſcended. 14 *H.*6.2. 15*E.*3. *Bar.* 255.

If Tenant in tail of lands make a gift in tail, or a Leaſe for life, rendring a rent and dieth, and the iſſue bring a Formedon in the diſcender, the Reverſion and Rent ſhall not bar the demandant, becauſe by his Formedon he is to defeat the reverſion and rent. *Et non poteſt adduci exceptio ejuſdem rei, cujus petitur diſſolutio.* 38 *E.*3. 22, 23, 24. 13*E.*3.*Gar.* 35.

But if other Aſſets in fee-ſimple do diſcend, then this warranty in Law and Aſſets is a good bar in the Formedon, 16*E.*3.*Age* 45. 31*E.*3.*Gar.*29.

Here four things are to be obſerved. 1. That no warranty in Law doth bar any collateral Title, but is in nature of a lineal warranty, wherein note the equity of the Law. *Fo.* 384 *b.*

2. That an expreſs warranty ſhall never bind the heirs of him that made the warranty unleſs they be named, but in caſe of warranty in Law, in many caſes the heirs ſhall be bound to warranty, albeit they be not named.

3. That in ſome caſes warranties in Law do extend to execution in value, of ſpecial Lands, and not generally of Lands deſcended in fee-ſimple. *Lib.* 4. *fol.* 121. *Buſtards* Caſe.

4. That warranty in Law may be in ſome caſes created without Deed, as upon gifts in tail, Leaſes for life, eſchanges, and the like. 45*E.*3.20.*b.*

Alſo it is neceſſary to ſhew who ſhall take advantage of a warranty, as Aſſignee by way of voucher to have recompence in value.

If

If a man infeoff *A.* and *B.* to have and to hold to them and their Heirs and Aſſigns, with a clauſe of warranty *prædictis A.* and *B. & eorum hæred' & Aſſignatis*, in this caſe if *A.* dieth, and *B.* ſurviveth, and dieth, and the heir of *B.* infeoffeth *C.* he ſhall vouch as Aſſignee, and yet he is but the Aſſignee of the heir of one of them, for in judgment of Law the Aſſignee of the heir is the Aſſignee of the Anceſtor, and ſo the Aſſignee of the Aſſignee ſhall vouch in *infinitum*, within theſe words (his Aſſigns) 14 *E.* 3. *Gar.* 33. 13 *E.* 1. *Gar.* 83. *lib.* 5. *fol.* 17. *b. Spencers* Caſe. 38 *E.* 3. 21.

If a man infeoff *A.* to have and to hold to him, his Heirs and Aſſigns, *A.* infeoffeth *B.* and his heirs, *B.* dieth, the heir of *B.* ſhall vouch as Aſſignee to *A.* ſo as heirs of Aſſignees, and Aſſignees of Aſſignees, and Aſſigns of Heirs, are within this word (Aſſigns) which ſeemed to be a *Qu.* in *Bracton's* time, and the Aſſignee ſhall not only vouch, but have a *Warrantiæ Cartæ*, 12 *E.* 2. *Vouch.* 263. 19 *E.* 2. *Gar.* 85. 13 *E.* 1. *ib.* 93. 36 *E.* 3. *Gar.* 1. 4 *H.* 8. *Dyer* 1. *F. N. B.* 135.

If a man doth warrant Land to another without this word (Heirs) his heirs ſhall not vouch; and regularly if he warrant land to a man and his heirs, without naming Aſſigns, his Aſſignee ſhall not vouch. But if the Father be infeoffed with Warranty to him and his heirs, the Father infeoffeth his eldeſt Son with Warranty, and dieth, the Law giveth to the Son advantage of the Warranty made to his Father, becauſe by act in Law, the Warranty between the Father and the Son is extinct, 43 *E.* 3. 23. 24 *E.* 3. 3. 11 *H* 4. 94. 5 *E.* 3. *Age* 19. *Pl. Com.* 418.

But note a diverſity between a Warranty that is a Covenant real, which bindeth the party to yield Lands or Tenements in recompence, and a Covenant annexed to the Land, which is to yield but damage, for that a Covenant in many caſes extendeth further than the Warranty. As for Example;

It hath been adjudged, that where two Coparceners made

partition of Land, and the one made a Covenant with the other, to acquit her and her heirs of a ſuit that iſſued out of the Land, the Covenantee aliened: in that caſe the Aſſignee ſhall have an action of Covenant, and yet he was a ſtranger to the Covenant, becauſe the acquital did run with the Land, 42 *E.*3.*b.per Finchden.fol.* 385.*a.*

A. ſeiſed of the Manor of D. whereof a Chappel was parcel, a Prior with the aſſent of his Covent, Covenants by Deed indented with *A.* and his heirs, to celebrate divine Service in his Chappel weekly, for the Lord of the Manor and his Servants, &c. In this caſe the aſſignee ſhall have an action of Covenant, albeit they were not named, for that remedy by covenant doth run with the Land to give damages to the party grieved, and was in manner appurtenant to the Manor, 42 *E.*3.3.*a.Laurence Pakenhams* caſe.6 *H.* 4.1.*Ralph Brabſons* caſe.

But if the Covenant had been made with a ſtranger to celebrate divine Service in the Chappel of *A.* and his heirs, there the Aſſignee ſhall not have an action of Covenant, for the Covenant cannot be annexed to the Manor becauſe the Covenantee was not ſeiſed of the Manor. *Vide lib.*5.*fol.* 17.18. *Spencers* caſe. 2 *H.*4.6.*H. Hornes* caſe.

And note, that an Aſſignee of part of the Land ſhall vouch as Aſſignee.

As if a man make a Feoffment in fee of two acres to one, with warranty to him, his Heirs and Aſſigns; if he make a feoffment of one acre, that feoffee ſhall vouch as Aſſignee; for there is a diverſity between the whole eſtate in part, and part of the eſtate in the whole, or of any part.

As if a man hath a Warranty to him, his heirs and Aſſigns, and he make a leaſe for life, or a gift in Tail, the leſſee or donee ſhall not vouch as Aſſignee, becauſe the whole eſtate is out of the leſſor or donor, and by this means he ſhall take advantage of the Warranty.

But if a leaſe for life, or a gift in Tail be made, the remainder over in fee, ſuch a leſſee or donee ſhall vouch as Aſſignee, becauſe the whole eſtate is out of the leſſor, and

the

the particular eſtate and the remainder do in Judgment of Law to this purpoſe make but one eſtate, 18 *E.*4.52. 10.*E.*3. 58.5 *E.*3.40.Accord.*H.*14. 1. in *Com.Banc.*

If a man infeoff three with Warranty to them and their heirs, and one of them releaſe to the other two, they ſhall vouch; but if he had releaſed to one of the other, the warranty had been extinct for that part, for he is an Aſſignee, 40 *E.*3.14.40 *Aſſ.*5.33 *H.*6.4.37 *H.*8. *Alienation, &c.* 31.8 *H.*4.8.

If a man doth warrant land to two men and their heirs, and the one make a feoffment in fee, yet the other ſhall vouch for his moity, 11 *R.*2. *Detin.* 46. 7 *E.*3. 35.46 *E.*3. 4.

If a man at this day be infeoffed with Warranty to him, his Heirs and Aſſigns, and he make a gift in tail, the remainder in fee, the donee make a feoffment in fee, that feoffee ſhall not vouch as Aſſignee (but * he that cometh in in privity of eſtate.)

If the Warranty be made to a man and his heirs, without this word (Aſſigns) yet the Aſſignee or Tenant of the Land may rebut; and albeit no man ſhall vouch or have a *Warrantia Cartæ*, either as party, Heir or Aſſignee, but in privity of eſtate, yet any that is of another eſtate, be it by Diſſeiſin, Abatement, Intruſion, Uſurpation, or otherwiſe, ſhall rebut by force of the warranty, as a thing annexed to the Land, which ſometimes was doubted in our Books, 38 *E.*3. 21. 26*E.*3. 56. *l.*10. *fo.*96.b. *Seymors* Caſe. 10*Aſſ.*5. 35*Aſſ.*9. 22*Aſſ.*3. 988. 31 *Aſſ.*12.

And herein note a diverſity, when he that rebutteth claimeth under the Warranty, and when he claimeth above the Warranty, for there he ſhall not rebut.

And therefore if Lands be given to two Brethren in fee ſimple, with a Warranty to the eldeſt and his heirs, the eldeſt dieth without iſſue, the ſurvivor, albeit he be heir to him, yet ſhall he neither vouch nor rebut, nor have a *Warrantia Cartæ*, becauſe his Title to the Land is by relation above the fall of the Warranty, and he cometh not under the eſtate

of him to whom the warranty is made, as the diſſeiſor, &c. doth.

If a man make a giſt in Tail at this day, and warrant the land to him, his heirs and aſſigns, and after the donee make a feoffment, and dieth without iſſue, the warranty is expired as to any Voucher or Rebutter, for that the eſtate Tail whereunto it was knit, is ſpent: Otherwiſe it is if the giſt and feoffment had been make before the Statute of *Donis Cond.* for then both the donee and feoffee had a fee ſimple; and ſo are our Books to be intended in this and the like caſes; *Lib.* 3. *fo.* 63. *Linc. Coll.* caſe.

If *A.* be ſeiſed of Lands in fee, and *B.* releaſe unto him, or confirmeth his eſtate in fee with warranty to him, his heirs and aſſigns, All men agree this warranty to be good: but ſome have holden, That no warranty can be raiſed upupon a bare Releaſe or Confirmation, without paſſing ſome eſtate or tranſumutation of poſſeſſion, 14 *E.* 3. *garr.* 108. 12 *H.* 7. 1.

But the Law, as it appeareth by *Littleton* himſelf, is to the contrary; and that both the party, and (as ſome do hold) his Aſſignee, ſhall vouch; but he that is vouched in that caſe muſt be preſent in Court, and ready to enter into the warranty and to anſwer; and the Tenant muſt ſhew forth the Deed of Releaſe or Confirmation with warranty, to the intent the Demandant may have an anſwer thereunto, and either deny the Deed or avoid it; for that at the time of the Confirmation made, he to whom it was made, had nothing in the land, &c. for otherwiſe the Demandant may counterplead the Voucher by the Statute of *W.* 1 cap. 40. *viz.* that neither Vouchee, nor any of his Anceſtors, had any ſeiſin whereof he might make a feoffment. And this is grounded upon the ſaid Statute of *W.* 1. *Sil neit ſeu gar. en preſent, que lun voile gar. de ſon gree, & maintenant enter en reſpons*; otherwiſe the Tenant muſt be driven to *Warrantia Cartæ*, 11 *H.* 4. 22. 10 *E.* 3. 52. 21 *E.* 3. 37. *Vide Sect.* 306. 738. & 745. & *Vide* 30 *E.* 1. *Stat. ad vocat. ad Warr.*

But a warranty of it ſelf cannot enlarge an eſtate, as if the

the leſſor by Deed releaſe to his leſſee for life, and warrant the land to the leſſee and his heirs, yet doth not this enlarge the eſtate, 22*Hen.*6.15. 2*Hen.*4.13. 43*Ed.*3.17. 43*Aſſ.*42.12 *Aſſ.*17.12*Ed.*3.*Tail* 3.22*Ed.*4.16.*b.*44*Ed.*3.10.44*Aſſ. Baſſingburns* caſe.

If a man make a feoffment in fee with Warranty to him, his heirs and aſſigns by Deed, (as it muſt be) and the feoffee infeoff another by parol, the ſecond feoffee ſhall vouch, or have a *Warrantia Cartæ* as Aſſignee, albeit he hath no deed of the Aſſignment, *l.*3.63.

If a man infeoff two, their heirs and Aſſigns, and one of them make a feoffment in fee, that feoffee ſhall not vouch as Aſſignee, 29*Ed.*3.70. 17*Edw.*2. *Joynd. in action* 1. 11*Edw.* 4. 8.

If a man make a feoffment in fee to *A.* his heirs and aſſigns, *A.* infeoffeth *B.* in fee, who re-infeoffeth *A.* He or his aſſigns ſhall never vouch, for *A.* cannot be his own Aſſignee. But if *B.* had infeoffed the heir of *A.* he may vouch as Aſſignee, for the heir of *A.* may be Aſſignee to *A.* in as much as he claimeth not as heir.

*Sect.*734. *Fol.*386. *a.*

The Heir ſhall never be bound by any expreſs warranty but where the Anceſtor was bound by the ſame warranty. 31*Ed.*1. *Gar.*83.

Nota quod hæres non tenetur in Anglia ad debita anteceſſoris reddenda niſi per anteceſſorem ad hoc fuerit obligatus, præterquam debita regis tantum: A fortiori in caſe of Warranty which is in the realty, *Fleta lib.*2.*cap.*55. *Brit.fol.*65.*b.* 11*Hen.*6.48.

But a Warranty in Law may bind the Heir, although it never bound the Anceſtor, and may be created by a laſt Will and Teſtament. As if a man deviſe lands to *A.* for life or in tail, reſerving a rent, the deviſee for life or in tail, ſhall take advantage of this warranty in Law, albeit the Anceſtor was not bound, and ſhall bind his heirs alſo

to Warranty, although they be not named. Alſo an expreſs Warranty cannot be created without Deed, and a Will in writing is no deed, and therefore an expreſs Warranty cannot be created by Will, 18 *Ed.* 3. 8.

Sect. 736. *Fol.* 386 *b.*

Note a diverſity, the lien real, as the Warranty, doth ever deſcend to the heir at the Common Law; but the lien perſonal doth bind the ſpecial heirs, as all the heirs in Gavelkind, and the heir on the part of the Mother, *vide Sect.* 603, 718, 737. 11 *E.* 3. 7. 11 *Hen.* 7. 12.

If two men make a feoffment in fee with warranty, and the one dieth, the feoffee cannot vouch the ſurvivor only, but the heir of him that is dead alſo; but otherwiſe if two joyntly bind themſelves in an Obligation, and the one die, the ſurvivor only ſhall be charged, 17 *E.* 3. *Joynt.* 41. 16 *H.* 7. 13. 29 *E.* 3. 46. 12 *H.* 7. 3. 22 *E.* 3. 1. 17 *E.* 3. 8. 30 *E.* 3. 43. 19 *H.* 6. 55 *l.* 3. *f.* 14. *Mat. Herberts* Caſe.

Two brothers by demy venters, the eldeſt releaſeth with warranty to the diſſeiſor of the Uncle, and dieth without iſſue, the Uncle dieth, the warranty is removed, and the younger brother may enter into the Land, *Sect.* 737.

Sect. 738. *fol.* 387.

A warranty may be limited, and a man may warrant lands as well for term of life, or in Tail, as in fee, 38 *Ed.* 3. 14. 16 *E.* 3. *Vouch.* 87.

If Tenant in fee ſimple that hath a warranty for life, either by any expreſs Warranty or by *Dedi*, be impleaded and vouch, he ſhall recover a fee ſimple in value, albeit his warranty were but for term of life, becauſe the warranty extended in that caſe to the whole eſtate of the feoffee in fee ſimple: but in the caſe that *Littleton* here putteth; the Tenant for life ſhall recover in value but an eſtate for life, becauſe the warranty doth extend to that eſtate only, *vide Sect.* 733. & 706.

And

And here (in this Section) is implied, that a collateral warranty giveth no right, but ſhall bar only for life, and after the party is reſtored to his action.

Alſo note, that a Warranty may deſcend to the heirs of him that made it during the life of another.

Sect. 739.

Si un home leſſa ſes terres a un aut' a aver & tener a luy & a ſes heirs pur terme d'auter vie, & le leſſee mor' vivant celuy a que vie, &c. & un eſtranger enter en la terre, l'heir le leſſee luy poit ouſter, &c. The heir of the leſſee ſhall have the Land to prevent an occupant; and ſo it is in caſe of an annuity, or of any other thing that lieth in grant, whereof there can be no occupant, 77*E.*3.48.18*E.*3.12. 11*H.*4.42.7*H.*4.46. 8*H.*4.15.*Dyer* 8.*Eliz.*253.18*H.*8.3.27*H.*8.21*H.*8.*Eſtat.Br.*10. 19*E.*3.*Account* 56.33*Aſſ.p.*17.22*H.*6.33.39*E.*3.37.*vide Sect.* 387.

Sect. 740.

Chattels as well real as perſonal ſhall go to the Executor, or Adminiſtrator, 11*E.*3.*tit.Aſſ.*88.11*Aſſ.*21.10*Eliz.Dyer* 276.

But if the Kings Tenant by Knights ſervice in Capite be ſeiſed of a Manor, whereunto an Advowſon is appendant, and the Church become void, the Tenant dieth and his heir within age, the King ſhall preſent to the Church, and not the Executor or Adminiſtrator: but if the Land be holden of a common perſon, in that caſe the Executor ſhall preſent, and not the Guardian, 24*E.* 3.26.*F.N.B.*33.*b.&* 34.*a.*

If a Biſhop hath a Ward fallen and dieth, the King ſhall not have the Ward nor the Succeſſor but the Executor, and the Ward ſhall be Aſſets in his hands. So it is of Heriots, Relief, &c. 40*E.*3.14.

But if a Church become void in the life of a Biſhop, and ſo remain until after his deceaſe, the King ſhall preſent thereunto, and not the Executor or Adminiſtrator, for nothing can be taken for a preſentment, and therefore it is no Aſſets, 9 *H.*6. 58.11*H.*4.7.

Sect. 741. *Fo.* 388.a.

Here the collateral warranty doth deſcend upon the iſſue in tail, before any right doth deſcend unto him, wherein this diverſity is to be obſerved (*vide Sect.* 707.) where the right is in *eſſe*, in any of the Anceſtors of the heir, at the time of the diſcent of the collateral warranty, there albeit the warranty deſcend firſt, and after the right doth deſcend, the collateral warranty ſhall bind, as appeareth in the caſe of our Author. But where the right is not in *eſſe* in the heir, or any of his Anceſtors at the time of the fall of the warranty, there it ſhall not bind.

As if Lord and Tenant be, and the Tenant make a feoffment in fee with warranty and after the feoffee purchaſe Seigniory, and after the Tenant *ceſſe* the Lord ſhall have a *Ceſſavit*, for a warranty doth extend to rights precedent, and never to any right that commenceth after the warranty, 7 *E.* 3. 48. 30 *Hen.* 8. 42.

Alſo a warranty ſhall never barr any eſtate that is in poſſeſſion, reverſion or remainder that is not deveſted, diſplaced, or turned to a right before, or at the time of the fall of the warranty.

If a Leaſe for life be made to the Father, the remainder to his next heir, the Father is diſſeiſed and releaſed with warranty and dieth this ſhall barr the heir although the warranty doth fall, and the remainder cometh in *eſſe* at one time, *lib.* 1. fol. 67. *Archers* Caſe.

If there be Father and Son, and the Son hath a rent ſervice, ſuit to a Mill, rent charge, rent ſeck, common of paſture, or other profit apprender out of the Land of the Father, and the Father maketh a feoffment in fee with warranty and dieth, this ſhall not bar the Son of the rent, common, &c. *quia in tali caſu tranſit terra cum onere*, and he that is in ſeiſin, or poſſeſſion, need not to make any entry, or claim; and albet the Son after the feoffment with warranty, and before the death of the Father had been diſſeiſed, and ſo being out of poſſeſſion, the warranty deſcended upon him,

him, that it ſhould not bind him becauſe at the time of Warranty made, the Sun was in poſſeſſion. *Temps E.* 1. *vouch* 296. 31 *Aſſ.* 13. 22 *Aſſ.* 36. 41 *Aſſ.* 6. 33 *E.* 3. 3. *Gar.* 24. *c.* 10. *f.* 97. *E. Seymors* Caſe.

So if my collateral Anceſtor releaſeth to my Tenant for life, this ſhall not bind my reverſion or remainder, becauſe the reverſion, &c. continued in me, 45 *E.* 3. 31. 21 *H.* 7. 11.

But if he that hath a Rent, Common, or any profit out of the land in tail, diſſeiſe the Tenant of the land, and maketh a feoffment to the land and warranteth the land to the feoffee and his heirs regularly the Warranty doth extend to all things iſſuing out of the land (*i.e.* to warrant the land in ſuch plight and manner as it was at in the hand of the feoffor at the time of the feoffment with Warranty, and the feoffee ſhall vouch, as of lands diſcharged of the rent &c. at the time of the feoffment made. *Vide S.* 698. 21 *E.* 4. 26. 28 *H.* 7. 9. 3 *H.* 7. 4. 7 *H.* 4 17. 30 *H.* 8. *Dy.* 42. 30 *E.* 3. 30. 9 *E.* 3. 28. 45 *E.* 3. *Vouch.* 72. *F.N.B.* 145. 14 *H.* 8. 6.

A woman that hath a rent-charge in fee, intermarrie with the Tenant of the land, an eſtranger releaſeth to the Tenant of the land with Warranty, he ſhall not take advantage of this Warranty, either by Voucher or *Warrantia Cartæ*, for the wife, if the husband die, or the heir of the wife living, the husband cannot have an action for the rent upon a Title, before the Warranty made, for if the heir of the wife bring an Aſſize of *Mortdanc.* this action is grounded after the Warranty, whereunto the Warranty ſhall not extend.

So it is if the grantee of the rent grant it to the Tenant of the land upon condition, which maketh a feoffment of the land with Warranty this Warranty cannot extend to the rent, albeit the feoffment was made of the land diſcharged of the rent, for if the condition be broken and the grantor be intitled to an action, this muſt of neceſſity be grounded after the Warranty made.

But in the caſe aforeſaid, when the woman grantee of the rent

rent marrieth with the Tenant, and the Tenant maketh a feoffment in fee with warranty, and dieth, in a *Cui in vita* brought by the wife (as by Law ſhe may) the feoffee ſhall vouch as of lands diſcharged at the time of the warranty made, for that her Title is Paramount.

So if Tenant in Tail of a rent charge purchaſe the land, and make a feoffment with warranty, if the iſſue bring a *Formedon* of the rent, the Tenant ſhall vouch, *Cauſa qua ſupra.* 7 *H.*4.17.

But ſome do hold, that a man ſhall not vouch, &c. as of land diſcharged of a rent ſervice. 10 *E.* 4. 2. *b.* 28 *E.*3.55. 44 *E.*3.29.

Alſo no warranty doth extend unto meer and naked Titles, as by force of a condition, with clauſe of Re-entry, Exchange, Mortmain, conſent to the Raviſher, &c. becauſe that for theſe an action doth lie, and if no action can be brought, there can be neither Voucher, Writ of *Warrantia Cartæ*, nor Rebutter, and they continue in ſuch plight and eſſenee, as they were by their original creation, and by no act can be diſplaced or deveſted out of their original eſſence, and therefore cannot by any warranty, *l.* 10. *fo.* 97 41 *Aſſ.p.*46.

And albeit a woman may have a Writ of Dower, &c. yet becauſe her title of Dower cannot be deveſted out of the oriniginal eſſence, a collateral warranty of the Anceſtor of the woman ſhall not barre her. So it is of a feoffment, *cauſa matrim. prælocuti*, 34 *E.*3. *Droit* 72. 21 *E.*4.82.

A warranty doth not extend to any leaſe for years, or to any eſtates of Tenants by Statute Staple, Merchant or Elegit, or any other Chattel, but onely to Freehold or Inheritance. And this is the reaſon, that in all actions which leſſee for years may have, a warranty cannot be pleaded in barre, as in an action of Treſpaſs, or upon the Statute of 5. *R.*2, *&c.* 21 *E.*4.18.82.1 *H.*7.12.22.11 *H.*7.15,16.20 *H.* 7.2.*b.*14 *H.*7.22.43 *E.*3.15. *per Finchden in Quimp.* 15 *H.* 7.9.

But in ſuch actions which none but a Tenant of the Free-

hold

hold can have, as upon the Statute of *H. 6. Aſſ. &c.* there a Warranty may be pleaded in bar.

Although a collateral Warranty be deſcended, yet if the eſtate whereunto the Warranty was annexed be defeated, albeit it be by a meer ſtranger (as in this caſe that *Littleton* here puts by the diſcontinuee) the warranty is deſeated: and although the diſcontinuance remain and no Remitter wrought to the heir, yet the warranty is defeated, and bar removed, ſo as the iſſue in Tail may have his Formedon and recover the land. *Sublato Principali, tollitur Adjunctum,* 3 *H.* 7. 9. *b.* 16 *E.* 3. *Continual claim* 10. 9 *H.* 4. 8. *Pl. Com.* 158.

Sect. 743. *Fo.* 390. *a.*

Si tenant in tail fait un feoffment a ſon uncle, & puis l'uncle fait un feoffment in fee, oveſque gar', &c. a un auter, &c.

When the Uncle taketh back as large an eſtate as he had made, the warranty is deſeated, becauſe he cannot warrant land to himſelf.

And ſo it is if the Uncle had made the warranty to the feoffee, his heirs and aſſigns, and taken back an eſtate in fee, and after infeoffed another, yet the warranty is defeated, for that he cannot be aſſignee to himſelf, 40 *E.* 3. 14. 16 *E.* 3. *Vouch.* 87. 19 *E.* 3. *Vouch,* 122. 17 *E.* 3. 73, 74. 20 *H.* 6. 29.

A man ſhall not regularly vouch himſelf as Aſſignee of a fee ſimple. And yet if the Father be infeoffed with warranty to him and his heirs the Father infeoffeth his heir apparent in fee, and die, he ſhall vouch himſelf, and be heir in Borough Engliſh, by reaſon the act in Law determined the warranty between the Father and the Son, 41 *E.* 3. 25. *a.*

But if a man make a feoffment in fee with warranty to the feoffee, his heirs and aſſigns, and the feoffee reinfeoff the feoffor and his wife, or the feoffor, and any other ſtranger, the warranty remaineth ſtill, 11 *H.* 4. 20. 42. 27 *E.* 3. 47. 49. 18 *E.* 3. 56. 29 *E.* 3. 46. 39 *E.* 3. 9.

Sect.

Sect. 744. *ib.*

A man infeoffeth a woman with warranty, they intermarry, and are impleaded upon the default of the husband, the wife is received, ſhe ſhall vouch her husband, &c. notwithſtanding the warranty was put in ſuſpence, 6*E.*2.*Vouch.*257. 3*E.*3.*ib.* 201.5*E.*3.16.178.

And ſo on the other ſide, if a woman infeoff a man with warranty, and they intermarry and are impleaded, the huſband ſhall vouch himſelf and his wife by force of the ſaid warranty, 4*E.*2.*Vouch.*245,246.

An Infant *en ventre ſa mere* may be vouched if God give him a birth, and if not ſuch a one heir to the warranty, but he cannot be vouched alone without the heir at the Common Law, for Proceſs ſhall be preſently awarded againſt him, *Temps E.*1. *Gard.*1.3. 31*E.*1. *Breve* 873. 8*E.*2. *Vouch.*237. 11*E.*3.*ib.*13. 9*H.*6.24.*Pl.Com.Stowels* caſe, *per Saunders* and *Brown.*

Tenant in tail maketh a feoffment in fee with warranty, and diſſeiſe the diſcontinuee, and dieth ſeiſed, leaving Aſſets to the iſſue; ſome hold that in reſpect of this ſuſpending warranty and Aſſets, the iſſue in tail ſhall not be remitted, but that the diſcontinuee ſhall recover againſt the iſſue in tail, and he take advantage of his warranty, if any he hath, and after in a Formedon brought by the iſſue, the diſcontinuee ſhall bar him in reſpect of the warranty and Aſſets, and ſo every mans right ſaved, 21*E.*3.36.*a.b.* 38*E.*3.21.44*E.*3.26.45*E.*3 *Title* 32.44*E.* 3.*ib.*31.33*E.*3.*ib.*4.

Sect. 745.

Note a diverſity; In the caſe of an Appeal, the Defendant ſhall forfeit no lands, but ſuch as he had at the time of the outlawry pronounced, for that there is no time alledged in the Writ, when the Felony was done: But in caſe of Indictment, ſuch as he had at the time of the Felony committed,

mitted for there is a certain time alledged. And in the caſe of the Indictment there is alſo a diverſity to be obſerved; for it ſhall relate to the time alledged in the Indictment, for avoiding of Eſtates, Charges, and Incumbrances, made by the Felon after the Felony committed, but for the mean profits of the land, it ſhall relate only to the Judgment, as well in this caſe of Outlawry, as in other caſes, 33 *E.* 3. *Forfeit.* 30. 38 *E.* 2. 31. 3 *E.* 4. 25. 19 *E.* 4. 2. *Pl. Com.* 488. *b.*

Felony, *Ex vi termini ſignificat quodlibet capitale crimen felleo animo perpetratum.* Glanv.

If a Felon be convicted by Verdict, Confeſſion or Recreancy, he doth forfeit his goods and chattels, &c. preſently. A man is ſaid convict before he hath Judgment. For Felony by Chance-medley, or *ſe defendendo*, or *petit larceney*, a man ſhall forfeit his goods and chattels, and no lands of any eſtate of Freehold or Inheritance. *Stanf. Prerog.* 45. *b.* 16 *E.* 3. *Cor.* 116.

By the Law at this day under the word (Felony) in Commiſſions, &c. is included Petit Treaſon, Murther, Homicide, Burning of Houſes, Burglary, Robbery, Rape, &c. Chance-medley, *Se defendendo*, and *Petit larceny*.

Sect. 746, 747.

It is a general rule, That having reſpect to all thoſe whoſe blood was corrupted at the time of the Attainder, the Pardon doth not remove the corrupting of blood neither upward nor downward *Bract. l.* 3. *fo.* 132, *&c. Brit. fo.* 215. *b.*

As if there be Grandfather, Father and Son, and the Grandf. and Father have divers other Sons; if the Father be attainted of Felony and pardoned, yet doth the blood remain corrupted, not only above him and about him, but alſo to all his Children born at the time of this Attainder.

But in the caſe of *Littleton* if Tenant in tail at the time of his Attainder had no iſſue, and after his pardon had iſſue, that iſſue ſhould have been bound by the warranty.

And if his Father had iſſue before the Pardon, and had iſ-

ſue

ſue alſo after and dieth, nothing can deſcend to the youngeſt, for that the eldeſt is living and diſabled. But if the eldeſt ſon had died in the life of the Father without iſſue, then the youngeſt ſhould inherit.

Nota. That a judgment againſt a man for felony, is that he be hanged by the neck until he he dead, but *implicative*, he is puniſhed. 1. In his wife, That ſhe ſhall loſe her dower. 2. In his children, they ſhall become baſe and ignoble. 3. He ſhall loſe his poſterity, for his blood is ſtained and corrupted, that they cannot inherit unto him, or any other Aunceſter. 4. He ſhall forfeit all his lands, and tenements which he hath in fee, and which he hath in tail, for term of his life. And 5. all his goods and chattels.

The wife of a man attainted of high Treaſon or pety Treaſon ſhall not be received to demand Dower, unleſs it be in certain caſes ſpecially provided for. *Stan. Pl. Cor.* 195.

But the wife of a perſon attainted of miſpriſion of Treaſon, Murther, Felony is dowable ſince our Author wrote by the Statute of 1 *E.* 6. *cap.* 13. 5 *E.* 6. *cap.* 11. 5 *El. ca.* 1. & 11. 18 *El. cap.* 1. 12 *H.* 4. 3. *Vide Sect.* 55.

So if a Seigniory be granted with warranty and the Tenancy eſcheat, the Seigniory whereunto the warranty was annexed is extinct, and conſequently the warranty defeated, and it ſhall not extend to the land, & *ſic in ſimilibus*, 6 *H.* 4. 8. 45 *E.* 3. *vouch.* 72. *Pl. Com.* 292. 16 *E.* 3. *Age* 46. 28 *H.* 3. *vouch.* 281. 23 *E.* 3. *gar.* 77. *Vide Sect.* 200.

If a collateral Aunceſter releaſe with warranty, and enter into Religion, now the warranty doth bind; but if after he be deraigned, now it is defeated.

Sect. 748. *Fol.* 393.

Per releaſe de touts manners de garr. ou de touts covenants reall, ou de touts demandes, le garr. eſt extinct. Et mults autres caſes & matters ſont per queux home poit defeate garr. &c.

As by a defeaſance, as other things executory may; Alſo a warranty may loſe his force, by taking benefit of the ſame. 43 *E.* 3. 17. *Pl. Com. Brownings* caſe.

In

In a Precipe the tenant voucheth, and at the *ſequatur ſub ſuo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgement againſt the tenant; and afterwards the demandant brings a *Scire facias* againſt the tenant to have execution. In this caſe the Tenant may have a *War. Cartæ*. And if in that caſe a ſtranger had brought a *præcipe* againſt the Tenant, he might have vouched again, for by the judgment given againſt the Tenant, the warranty loſt not his force, but if the Tenant had judgment to recover in value againſt the vouchee, he ſhall never vouch again by reaſon of that warranty, becauſe he had taken advantage of the warranty; and it is to be obſerved that upon the proceſſe of *Summon. ad warr.* if the Sheriff return the vouchee ſummoned, and he make default, the Tenant ſhall have a *Capias ad val.* but if he return that the vouchee had nothing, then after the *Sicut alias & plures*, a *ſeq. ſub ſuo periculo* ſhall iſſue; and there if the vouchee make default, the Tenant ſhall not have judgment to recover in value, for he was never ſummoned, and it appeareth of Record, that he hath nothing, but in the *Cap. ad val.* it appeareth that he had Aſſets, and he had been ſummoned before: But in ſome ſpecial caſes, there ſhall be two recoveries in value upon one warranty. And if a diſſeiſor gives lands to the husband and wife, and to the heirs of the husband: the husband alieneth in fee with warranty and dieth, the wife bringeth a *Cui in vita*, the Tenant vouch and recover in value, if after death of the wife, the diſſeiſee bring a *præcipe* againſt the Alienee, he ſhall vouch, and recover in value again.

So it is where the wife bringing a Writ of Dower againſt the Alienee, he ſhall recover in value, and after her death, he ſhall recover in value again upon the ſame warranty. 45 *E.* 3. *vouch.* 72.

In the ſame manner it is if a man be ſeiſed of a rent by a defeaſible title, and releaſe to the Tenant of the Land all his right in the Land and warrant the Land to him and his heirs, if he be impleaded for the rent, he ſhall vouch and recover in value for the rent, and if after he be impleaded for the Land,

Land, he ſhall vouch, &c. again for the land: But in theſe and the like caſes the reaſon is in reſpect of the ſeveral Eſtates recovered, but for one and the ſame eſtate he ſhall never recover but once in value, and though the Land recovered in value be evicted, yet he ſhall never take benefit of that Warranty after; and as Warranty may be defeated in the whole, ſo they may be defeated as to the party of the benefit, that may be taken of the ſame. As he that maketh a warranty may make a defeaſance, not to take any benefit by way of voucher.

In the like manner that he ſhall take no advantage by way of *Warrantia Cartæ*, or by way of Rebutter. 7*H.*6.43.13 *Aſſ.* 8.13*E.*3.*Gar.*24,25.3.7.22*H.*6.5 1.8*H.*7.6.

*Sect.*749.

If Tenant in tail alien with warranty and leave Aſſets, to diſcend, if the iſſue in tail doth alien the Aſſets, and die, the iſſue of that iſſue ſhall recover the Land, becauſe the lineal warranty deſcends only to him without Aſſets, for neither the pleading of the warranty without Aſſets, nor Aſſets without warranty, is any bar in the Formedon in the diſcender.

But if the iſſue to whom the Warranty and Aſſets deſcended had brought a Formedon, and by Judgment had been barred by reaſon of the warranty and Aſſets; In that caſe albeit he alieneth the Aſſets, yet the eſtate tail is barred for ever: for a bar in a Formedon in the diſcender, which is a Writ of the higheſt nature that an iſſue in tail can have, is a good bar in any other Formedon in the deſcender brought afterwards upon the ſame giſt. *Temps E.* 1.*Gar.*89. 34*E.*1.*ib.*88. 11*E.*2. *ib.*3. 4*E.*3.24.5*E.*3.14.40*E.*3.9.14*H.*4.39.24*H.*8.*a. Br.* 33.4*M.Dy.* 339.*l.*10.37,38.*Mary Portingtons* caſe.

Epilogus.

Epilogus.

Nulla virtus, nulla ſcientia locum ſuum & dignitatem con-ſervare poteſt ſine modeſtia. Ratio eſt anima legis.

If by ſtudy and induſtry we make not the reaſon of the Law our own, it is not poſſible for us to retain it in our memories. And we muſt couple arguments and reaſons together.

Quia Argumenta ignota & obſcura ad lucem rationis pro-ferunt, & reddunt ſplendida. Sir *Richard Hankford*, 11 H.4. 37.

Home ne ſcavera de quel mettal un campane eſt, ſi ne ſoit bien bate, ne le ley bien conus ſans diſputation.

Jeo aye diſpute ceſt matter pur la apprender la ley, 41 E.3. 22. *Kirton. Vide Sect.* 377.

Lex plus laudatur quando ratione probatur.

Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria. Vide coſt definitio, Lib.1.fo.131. *Chudleys* Caſe.

Al Unique Dieu gloire.

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FINIS.